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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1890.**

No. ~~1270~~. 745 456 178

JOHN DOWER, HARRIET DOWER, JOHN DOE, RICHARD ROE, JOHN DENN, AND RICHARD FENN, PLAINTIFFS IN ERROR,

*vs.*

WILLIAM G. RICHARDS, FRANCIS S. RICHARDS, AND JAMES BENNALLACK, EXECUTORS OF PHILIP RICHARDS, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

**FILED SEPTEMBER 12, 1890.**

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1890.

## No. 1279.

JOHN DOWER, HARRIET DOWER, JOHN DOE, RICHARD ROE, JOHN DENN, AND RICHARD FENN, PLAINTIFFS IN ERROR,

*vs.*

WILLIAM G. RICHARDS, FRANCIS S. RICHARDS, AND JAMES BENNALLACK, EXECUTORS OF PHILIP RICHARDS, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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1 In the Supreme Court of the State of California.

WM. G. RICHARDS *et al.*, Plaintiffs and Respondents,
*vs.*
JOHN DOWER *et al.*, Defendants and Appellants. } No. 13107.

*Transcript on Appeal from Superior Court of Nevada County.*

H. L. Gear, attorney for defendants and appellants; P. F. Simonds and Fred. Searls, attorneys for plaintiffs and respondents.

Endorsed: Filed this 2d day of March, 1889. J. D. Spencer, clerk, by Frank Myers, deputy clerk.

2 In the Supreme Court of the State of California.

In the Superior Court in and for the County of Nevada, State of California.

WM. G. RICHARDS, FRANCIS S. RICHARDS, and JAMES BENNALLACK, Executors of the Last Will and Testament of Phillip Richards, Deceased, Plaintiffs,
*vs.*
JOHN DOWER, HARRIET DOWER, JOHN DOE, RICHARD ROE, JOHN DENN, and RICHARD FENN, Defendants.

*Complaint.*

Now come William G. Richards, Francis S. Richards, and James Bennallack, executors of the last will and testament of Phillip Richards, deceased, and, complaining as such executors of defendants therein, for cause of complaint aver—

3 & 4 I.

That on, to wit, the first day of May, 1887, Phillip Richards was the owner of, in the possession of, and entitled to the possession of those certain parcels of land situate within the corporate limits of the city of Nevada, in the county of Nevada, State of California, and designated on the official map of Nevada City, made by H. S. Bradley in 1869, as lot No. 6, in block No. 43, and lot No. 7, in said block 43; that thereafter, on, to wit, May 20, 1887, while the said Richards was so the owner of, in the possession of, and entitled to the possession of said land and premises the above defendants, John Dower, Harriet Dower, John Doe, Richard Roe, John Denn, and Richard Fenn, wrongfully and unlawfully entered into and upon the same and ousted and ejected the said Richards therefrom, and ever since said 20th day of May, 1887, have withheld and still do withhold the possession thereof from said Richards and from the plaintiffs herein, executors as aforesaid, to plaintiffs' damage in the sum of $1,000.00.

II.

Plaintiffs aver that the said Phillip Richards in his lifetime made and published his last will and testament, whereby he appointed plaintiffs executors thereof.

III.

That on the 27th day of May, 1887, at Nevada City, in the county of Nevada, State of California, the said Phillip Richards died.

5 IV.

That on the sixteenth day of June, 1887, at Nevada City, in said county and State, said will was duly proved and admitted to probate in the superior court in and for the county of Nevada, State of California.

V.

That thereafter, on, to wit, the 6th day of July, 1887, letters testamentary were issued on said will to the plaintiffs by the superior court of said county.

VI.

That thereupon the plaintiffs duly qualified and entered upon the discharge of their duties, and that said letters testamentary have not been revoked, but plaintiffs are the duly qualified and acting executors as aforesaid.

VII.

That plaintiffs are ignorant of the true names of the defendants, John Doe, Richard Roe, John Denn, and Richard Fenn; and for that reason bring this action against them by the aforesaid fictitious names, and ask that their true names when ascertained may be inserted herein.

Wherefore plaintiffs demand judgment against the said defendants, John Dower, Harriet Dower, John Doe, Richard Roe, John Denn, and Richard Fenn—

6 1. For the restitution of said land and premises.

2. For the sum of $1,000.00 *dollars* damages for the withholding thereof, together with costs of suit.

GAYLORD & SEARLS,
*Att'ys for Plaintiffs.*

STATE OF CALIFORNIA, }
*County of Nevada,* } ss:

WILLIAM G. RICHARDS, being first duly sworn, says that he is one of the plaintiffs in the above-entitled cause; that he has heard the foregoing complaint read and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

WILLIAM G. RICHARDS.

Subscribed and sworn before me this 15th day of Nov., 1887.
[SEAL.] FRED. SEARLS,
*Notary Public.*

Filed November 15, '87.

F. G. BEATTY, *Clerk*,
By W. D. HARRIS, *Deputy*.

*Answer.*

(Title of court and cause.)

Now come the defendants, and for answer to the complaint of plaintiffs herein deny that the said Phillip Richards was ever
7 at any time the owner of or entitled to the possession of any part of the land and premises described in plaintiffs' complaint as being in the possession of these defendants, and deny that said defendants or either of them have ousted or ejected said plaintiffs from any part of said land excepting such portion as is hereinafter specifically described; and defendants aver that the said Harriet Dower is the owner of and in possession of and entitled to the possession of a certain quartz ledge and mine, situated partly upon and crossing the said premises, known as the Dower quartz mine and formerly known as the Wagner ledge; and defendants aver that said Phillip Richards in his lifetime had no other right of possession of any part of the lands described in plaintiffs' complaint other than such as was derived from the town-site patent of the United States granted to the city of Nevada in the year 1869; and defendants allege that the said Wagner ledge and the portion thereof which crosses the said lands was known to be a gold-bearing ledge and was held, possessed, worked, and mined as such long prior and subsequent to the said patent, and was by the laws of the United States reserved from the operation of said patent, and is a part of the public mineral lands of the United States; that the said Harriet Dower has located a portion of said ledge under and pursuant to the laws of the United States, and is engaged in working and mining the same as a citizen of the United States pursuant to its laws; that the mineral location of the said Harriet Dower is known as and called the Dower mine, and crosses the said
8 land claimed by plaintiff; that these defendants have no possession or occupation of any part of said lands other than the said quartz ledge and the surface land adjacent thereto for working purposes; that no mining or work of any kind has been done by them excepting upon the said ledge within the limits of the ground claimed by said plaintiffs, and none has been done thereon outside of the limits allowed by the local mining rules which were in force in Nevada City mining district in the year 1869; that said mining rules then and prior to that year allowed of the occupation of one hundred feet upon each side of a quartz ledge for working purposes; that said mining rules are not now in force, and that the mineral location of said Harriet Dower includes, as it lawfully may, the space of three hundred feet on each side of said ledge for working purposes; that said location was made in the year 1881, after prior

locations had lapsed by failure to do annual work, but that the said Harriet Dower has not actually ousted said Phillip Richards or said plaintiffs from any part of the surface of said lands excepting a place upon the line of said ledge where they have sunk a shaft directly upon the ledge at a point which was actually held and worked for mining purposes by citizens of the United States prior to the said town-site patent, and that the dump and working materials of said Harriet Dower are all within the limits of such prior occupation for mining purposes. Defendants aver that the said John Dower and the other defendants herein have no other possession or
9 occupation of any part of said premises than as servants of the said Harriet Dower in the working of said mine as aforesaid.

Wherefore defendants pray judgment for their costs herein expended.

H. L. GEAR,
*Attorney for Defendants.*

STATE OF CALIFORNIA, } ss:
*County of Nevada,* }

HARRIET DOWER, being duly sworn, deposes and says that she has read the foregoing answer and knows the contents thereof, and that the same is true of her own knowledge except as to the matters therein stated on information and belief, and as to those matters she believes it to be true.

HARRIET DOWER.

Subscribed and sworn to before me this 25th day of November, A. D. 1887.

F. G. BEATTY,
*County Clerk, Nevada County, Cal.,*
By W. D. HARRIS, *Deputy.*

Service of within answer by copy admitted this 25th day of November, 1887.

GAYLORD & SEARLS,
*Attorneys for Plaintiffs.*

Filed November 25th, '87.

F. G. BEATTY, *Clerk,*
By W. D. HARRIS, *Deputy.*

10 *Findings of Fact, Conclusions of Law, and Judgment.*

(Title of court and cause.)

This cause having been tried by the court, a jury trial having been waived—

P. F. Simonds and Fred. Searls appearing as attorneys for the plaintiff, and H. L. Gear appearing as attorney for the defendants—

And the court having heard the proofs of the respective parties and considered the same, and the records, papers, and stipulations

in the cause and the argument of the respective attorneys thereon, and the cause having been submitted to the court, finds the following facts:

That a town-site patent to certain lands, including those in the complaint and hereinafter described, was issued by the Government of the United States to the city of Nevada on the first day of July, 1869.

That thereafter Phillip Richards, prior to the first day of May, 1887, acquired from the city of Nevada all the right obtained by the city of Nevada under said town-site patent to those certain parcels of patented land known and designated on the official map of Nevada City, made by H. S. Bradley in 1869, as lots six (6) and seven (7), in block No. forty-three (43).

That a quartz ledge, formerly known as the Wagner ledge, crosses said premises, viz., said town lots, and that said ledge was known and worked by various parties as a gold-bearing quartz lode for many years prior to 1868.

That said ledge was worked by means of tunnels, shafts, in-
11 clines, and stopes, and that many tons of gold-bearing rock were extracted therefrom, and that said rock was profitably worked.

That said ledge was never located; that there is no proof that any notice of location was ever posted thereon claiming said mine, or recorded, and the boundaries of the claim were never marked nor was any surface ground ever marked off or designated.

That the parties working said lode prior to the issuance of town-site patent were mere trespassers upon the public domain and are not shown to have had more than a mere *possessio pedis* of certain shafts, tunnels, and dumps.

That work was abandoned on said Wagner ledge in the winter of 1868–'9 and prior to the issuance of said patent.

That after the winter of 1868–'9 no labor was performed on the Wagner ledge by any of the former claimants or their grantees, and that the defendants in this action are not the grantees of any parties working said Wagner ledge prior to its abandonment or prior to the granting of town-site patent.

That the Wagner quartz lode bearing gold was known to exist on said lots prior to the granting of town-site patent in July, 1869, but there is no proof that the same had ever been located prior to or that there was any mine or mining claim or mining possession thereon at the time of the issuance of town-site patent.

That in 1884 the defendant Harriet Dower was a citizen of the United States, duly qualified to make a mining location, and
12 attempted to make a quartz mining location upon said Wagner lode within the limits of the town lots hereinbefore described, which location in manner and form complied with the requirements of the laws of the United States in respect to mining locations, and that by said location she claimed said quartz ledge, with three hundred feet in width on each side thereof, and that she has since done all annual work upon said ledge which is required by the laws of the United States.

That for the space of more than one year prior to the attempted location of the said ledge by Harriet Dower no annual work was done thereon by any prior claimant thereto or at all.

That defendant John Dower has no other possession or occupation of said premises or any part thereof than as the servant of defendant Harriet Dower; that the defendants other than John Dower and Harriet are fictitious.

That defendants excavated the soil on portion of the lots in controversy and sunk shafts on the claim.

That they have erected buildings on said lots, and have run earth, sand, and debris across the surface of said lots.

That defendant Harriet Dower has asserted title in herself, hostile to that of plaintiffs, to all that portion of said lot embraced in the Dower quartz location.

That on the first day of May, 1887, Phillip Richards was the owner of, in the possession of, and entitled to the possession of all of lots six and seven, in block forty-three, as hereinbefore described.

13 That thereafter, during the lifetime of said Richards and prior to the commencement of this action, while the said Richards was so the owner of, in the possession of, and entitled to the possession of said premises and the whole thereof, the defendants, John Dower and Harriet Dower, wrongfully and unlawfully ousted and ejected him, the said Richards, from all that portion of said premises described in the answer of said defendants as the Dower quartz mine, and ever since have and still do wrongfully and unlawfully withhold the possession thereof from said Richards and from the plaintiffs herein, executors of last will of said Richards.

That plaintiffs have by such withholding complained of suffered no damages.

That there is no proof in this cause that there were any local mining rules in force in Nevada City mining district in the year 1869 or at any time prior to the granting of town-site patent aforesaid in 1869.

That the said Phillip Richards died at Nevada City, in the county of Nevada, on the twenty-seventh day of May, 1887, leaving a last will and testament.

That said will was duly admitted to probate in the superior court of Nevada county, and that plaintiffs are the duly appointed, qualified, and acting executors under said will.

That the title of the said Phillip Richards to said lots and the right of possession thereunder is now in said plaintiffs as executors of said last will and testament, and that all title to said

14 lots acquired by the city of Nevada under said town-site patent is now vested in them.

As conclusions of law from the foregoing facts the court finds—

That the plaintiffs are the owners of and entitled to the possession of said lots six and seven, in block forty-three, as designated on the official map of Nevada City, made by H. S. Bradley in 1869, and the whole thereof.

That no portion of said lots was subject to location as a mining

claim at the date of said attempted location of Harriet Dower in 1884, but that said lots and the whole thereof passed to said Richards under town-site patent and subsequent conveyances.

That plaintiffs are entitled to a judgment against defendants for the restitution of all that portion of said lands described in the answer as the Dower quartz mine and to their costs of suit.

E. A. BRIDGFORD,
*Judge, Presiding at the Request of the Resident Judge.*

*Judgment.*

(Title of court and cause.)

This cause came on regularly for trial on the 15th day of June, 1888, P. F. Simonds and Fred. Searls appearing as counsel for plaintiffs, and H. L. Gear for the defendants.

A trial by jury having been expressly waived by the re-
15 spective parties, the cause was tried before the court without a jury, whereupon witnesses on the part of plaintiffs and defendants were duly sworn and examined and documentary evidence introduced by the respective parties, and, the evidence being closed, the cause was submitted to the court for decision, and, after due deliberation thereon, the court files its findings and decision in writing, and orders that judgment be entered herein in favor of plaintiffs in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that plaintiffs are the owners of and entitled to the possession of lots six and seven, in block (43), as designated on the official map of Nevada City, made by H. S. Bradley in 1869, and that they have and recover from defendants, John Dower and Harriet Dower, possession of all that portion of said lots designated in the answer of defendants as the Dower quartz mine, together with plaintiffs' costs of suit, amounting to — dollars.

Dated Sept. 29th, 1888.

E. A. BRIDGFORD,
*Judge, Presiding at the Request of the Resident Judge.*

Endorsed: Entered in Judgment Book No. 2, pp. 187–'8, Sept. 29, 1888. F. G. Beatty, clerk, by L. A. Bulfinch, deputy.

16 *Certificate to Judgment-Roll.*

(Title of court and cause.)

I, the undersigned, county clerk of the county of Nevada, State of California, and *ex officio* clerk of the superior court in and for said Nevada county, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action and recorded in Judgment Book 2 of said court at pages 187–'8; and I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

Witness my hand and the seal of said court this 29th day of September, 1888.

[SEAL.]

F. G. BEATTY, *Clerk*,
By W. D. HARRIS,
*Deputy Clerk.*

*Statement on Motion for New Trial.*

(Title of court and cause.)

On the trial of the above-entitled cause the following statement of facts was agreed to in writing by the counsel for the respective parties:

"It is agreed that the plaintiffs, as executors of the estate of Philip Richards, dec'd, have acquired whatever rights in the premises described in the complaint were acquired by the town-site patent of the city of Nevada, though it is not admitted that any title to the quartz ledge situated upon said premises or to a reasonable quantity of surface ground for the working thereof was ever ac-
17 quired under said town-site patent. It is agreed that a quartz ledge, formerly known as the Wagner ledge, crosses said premises, and that said ledge was known, claimed, and worked by various parties as a gold-bearing quartz ledge for many years prior to 1868, and was theretofore worked by means of shafts, inclines, stopes, and tunnels, and that many tons of gold-bearing quartz rock were extracted therefrom. It is further agreed that for the space of more than one year prior to the location of said ledge by Harriet Dower no annual work was done thereon by any prior claimants thereto, and that in the year 1884 said Harriet Dower, being a citizen of the United States, made a quartz mining location upon said ledge, which in form and substance complied with all the requirements of the laws of the United States in respect to mining locations, whereby she claimed said quartz ledge, with three hundred feet in width of ground on each side thereof, and has since done all annual work upon said ledge which is required by the laws of the United States."

The plaintiffs introduced in evidence the patent from the United States of America to the town site of the city of Nevada, bearing date July 1st, 1869, which included in its description the premises in controversy; also the papers showing that plaintiffs are the duly appointed executors of the estate of Philip Richards, deceased.

WM. G. RICHARDS testified that lots 6 and 7 and block 43 are situated within the limits of Nevada City; that there is a fruit orch-
18 ard there, and clover and wheat and hay grew there last year; that there is a dwelling-house on the premises which cost four thousand dollars, two barns, a chicken-house, and such outhouses as are necessary for a good home; that there are good fences all around it and sub-fences or cross-fences.

The defendants were working upon the premises as early or earlier than April, 1887, and opened cuts upon the surface, and

used pretty much the whole ranch at times, and sank shafts and had a windlass.

They opened places on the surface about four or five feet wide, large enough to work in, and made cuts in both lots. They dumped the dirt they dug out right there upon the clover and alfalfa, and continued to do so until November or December, 1887, when we served them with an injunction and they stopped when they had to quit by law.

They had erected a quartz mill and a little house that some parties slept in. The mill was a four-stamp quartz mill, steam-engine, pump, shaft, and car. They would run the dirt out and dump it on the lot. The mill was at the center of lot seven; it was close to the fence that runs just back of the house to enclose the lot around the house It was near enough for a man to walk between the building and the fence, and is about two hundred feet from the house. They excavated the ground on the surface and made a foundation—perhaps one hundred feet one way and perhaps sixty feet the other way. They dumped the dirt on the cultivated surface of the lot.

They finished the mill some time in December, and started
19 crushing rock, which they hoisted from the shaft which they sank. It was an incline shaft about five or six feet high and six or seven feet wide, and was sunk, I should judge, about two hundred feet. The earth they dug out they threw all over the place promiscuously. The steam-engine was put opposite the shaft and the landing was perhaps ten feet high, and the car came from the shaft on the landing and dumped the dirt on the land. There are four or five large dumps. The dump at the mill where they hoisted it is one hundred feet long and runs down lot seven on the surface. The dump at the incline shaft extends one hundred feet, and on account of the slope of the hill it cannot contain all the dirt and it goes as far as two or three hundred feet.

The other dumps were made by sinking a shaft and hoisting the dirt and perhaps running tunnels. There are three or four dumps. They pumped water from the shaft and used it in the mill and then it runs down over the ground. The refuse of the rock and tailings from the mill was dumped on the land and ruins it for agricultural purposes. The water that flowed from the mill was filled with quartz sand and debris, which spoiled the soil and renders it worthless.

The water flows over these lots three hundred feet and more. The lots alone are worth two thousand dollars, and the improvements are worth four thousand dollars.

They have destroyed the surface where the dirt has been hoisted from the mine, and the shafts have caused caving of big holes, perhaps all along the line, and perhaps the foundation of the
20 premises will be caving in also. The incline shaft dips toward the lot where the house stands and under the house. They stoped out rock along the line of the ledge going down and hoisted it through the incline shaft.

There are stopes they left that saved the surface, which has sunk along the line of the ledge. The dumps made utterly destroy the

surface covered unless they are removed. It would cost about one thousand dollars to remove them. Several grape vines have been knocked around by dirt thrown around them. Some cedar trees, I think, have caved in where the ground was excavated for getting out the rock. Some roots of trees were chopped off and dug up. The tailings flowed over three hundred feet to the lower end of the lot.

GEORGE GRAY testified that he came to Nevada City in 1851 and has known the Wagner ledge, which crosses the land of Philip Richards, ever since; that he worked upon the ledge; that it was first worked on the surface by shafts. The Wagner brothers first occupied and worked it on the surface and took out quartz. They also run a tunnel. There might have been a dozen points where they worked from the surface. I know of a dump that existed prior to 1869. There were shafts there—several prospect shafts. There was an incline shaft sunk the fore part of 1860 on this lot, which made a pretty large dump—somewhere over one hundred feet—and tunnels ran each way, and the ground was worked out. I first worked on the Wagner ledge in 1858, on a tunnel that runs
21 through there, which begun two or three hundred feet from the croppings of the ledge. The hill sloped down to a ravine called Woodpecker ravine, that empties into Deer creek, which runs through Nevada City. The tunnel was run by Hughes and Lovey. I have had considerable experience as a miner in discerning the value of rocks. We struck the ledge, and it was very wet. We worked out as much as we could in the water, and it would pay thirty-five and forty dollars a ton, and we got four or five tons.

The lowest grade of rock that would pay a practical miner good, profitable wages for taking it out and crushing it in this mine would be about seven dollars a ton. The Hughes and Lovey tunnel was run five or six hundred feet. At the time I worked it was run but a short distance—maybe about one hundred or one hundred and fifty feet. I can't say how much rock they took out. They would take it out and crush it, and they kept it up for some time. The Wagner brothers, I don't think, crushed rock above a year. I suppose they sold to Hughes and Lovey. After the Lovey Company the Sigourney Company worked there a very little southwest of where the Richards house now stands—in the same lot, which is called the Potter lot and is now claimed by the Richards estate. The Hughes and Lovey tunnel extended under the Potter lot and to the other side of it into the Bigelow lot. The Sigourney Company sank an incline on the ledge, and I worked in that incline.

I think they worked there many years. I know of my own personal observation of the character of the rock found in the
22 Sigourney works. Some of the rock that was taken out was very good. I took out quartz rock which I should say would pay from ten to fifteen dollars per ton. I prospected maybe one hundred or two hundred feet above the Sigourney house early in 1859; I was one of the company that owned this location. We took out some rock there and had it assayed. I should say it was worth

fifteen or twenty dollars a ton, or something like that. The dump of the incline went down the hill fifty or seventy-five feet below the croppings of the ledge. The custom was that a man went to work and run a tunnel where he pleased; there were no miners' rules or customs in existence. One hundred or one hundred and ten feet down this hill would be a reasonable quantity of ground for the convenient working of this quartz ledge—that is to say, outside of running the tunnel. If you wanted the tunnel you would have to go farther. It must be two hundred feet in some places from the croppings of the ledge to the ravine.

The Hughes and Lovey tunnel ran between two and three hundred feet from the line of the ledge; it might be less or more. The Wagner brothers worked in the Davenport lot, adjoining the Richards lot; it might be two hundred feet from the Richards lot. They sank shafts, I should think, twenty-five or thirty feet deep, more or less. I should think they took out, it might be, about four hundred and fifty tons of rock, or even less. I saw a notice of location posted on the Wagner ledge on a pine tree about three or four hun-
23 dred feet below the Richards lot. I cannot state its contents. They did not stake out ground in those days; there were trees enough to nail the notices on. The surface ground was dug over, and that is all I can say of marking and staking out the location.

The custom of miners was to run a tunnel anywhere they wanted to, and if they wanted to have it at a depth of one hundred feet they would go sufficiently far down the hill. Hughes and Lovey worked on what you call the Potter lot, along the croppings of the ledge or pretty close to it. I believe they sold out. The tunnels became caved in and abandoned. I last knew of their being open maybe eight or ten years ago. Davenport and Rich had their houses and ranches, and they bought a part of the claim, and Davenport broke the tunnel and caved it in. The Wagner ledge averages about a foot in thickness or near about it; it may be more. In the lower tunnel the ledge is two and a half feet in places. Its average is about twenty inches. The gold is found all in the ledge and gouge, what gouge there is. The ground outside the ledge will not pay for working. All that is valuable for gold is in the ledge itself. Davenport's lot is the one adjoining the Richards lot. He bought of the Hughes estate. I am sure the estate was sold.

The mining records were burned in 1856. I cannot tell the contents of the notice of Wagner's claim. I made a location before 1869 on the north; on the same ledge in 1865. No one worked the mine after Sigourney to my recollection. He worked up to
24 about 1865 or 1866 or some time along there. I cannot recollect whether he worked there as late as 1868. A Mr. Smith worked on the Wagner ledge in 1869 or 1870—somewhere along there. He worked there after 1869. I don't recollect the date the estate was sold out. It might have been as late as 1876 or 1877 that Smith worked there. That point was not over two or three or four hundred yards south of the lot in controversy.

Here counsel for the defendants offered to prove by the records of

Nevada county that the interest of Wm. Hughes, deceased, in the Wagner ledge was sold and conveyed by the order of the probate court of said county, for the consideration of $500 in gold coin of the United States, on the 26th day of June, 1871, to S. V. Davenport and J. C. Rich, which facts appear from the said records which were offered in evidence by the said defendants. Counsel for plaintiffs objected to the introduction of this evidence as being immaterial and irrelevant and not pertinent to the issues in the case. The objection was sustained by the court; to which ruling the counsel for defendants then and there duly excepted.

EDWARD WELDON testified: I knew of the Sigourney Company working on the Wagner ledge in 1868 or 1869—he could not say positively. I could not state positively. I think they worked there as late as 1868. I worked there in 1867. They were working on the Potter lot; that is now the Richards lot. It was formerly known as the Potter lot. The shaft was sunk when I worked there
25 in 1867. I guess Sigourney continued work there over a year after I worked there, anyhow. My son-in-law worked for him right along until he quit. I had forty years' experience as a miner. The rock we dug out was very good. As near as I could tell from its appearance, it was about seventy dollars a ton. I think work was done there all through 1868. As near as I can recollect, they worked there even up to 1869. I think I am certain of it.

I believe they quit in 1869. I remember that when I came from Pike City to Nevada City to vote at the presidential election in 1868 this mine was being worked.

It would require more surface on a hillside for dumping than if the mine was located on level ground. I think in this instance 300 feet on the hillside would be a reasonable quantity of surface ground for the convenient working of this ledge. This Potter or Richards lot is on a hillside going towards the ravine.

JOHN GRAY testified that he worked for Sigourney in 1868 or 1869 and took out rock. The rock was very good that I took out—I should think from $20 to $30 a ton, probably. It was rock that would pay for working. The last work done by Hughes and Lovey was prior to Sigourney's day. I think Sigourney leased it, but I don't know. In the working of this mine the flow of debris and water would have to go into Deer creek. I think it is about 400 feet from the line of the ledge to Woodpecker ravine.

JOHN DOWER testified: I examined the rock taken out by Sigourney, and I considered the rock worth $20 a ton on the
26 dump. I think the last work done — Sigourney & Co. in the Richards or Potter lot was in 1869.

The point where I commenced to sink was a point where sinking had been done by parties prior to 1869. We sank the incline in new ground until we got about 60 feet deep, and then we broke into an old one. At the point where we began there was the beginning of another shaft which went down a little ways. Where we

worked it was an open lot, and there were no improvements. There is a fence between where we were working and the house. We worked away from the house, so far as the dumping was concerned. We ran our dump somewhere like 100 feet, the farthest part of it, not more than that. It is 300 feet from the line of the ledge where we were working down to the ravine. It is 300 feet from where the Hughes and Lovey tunnel started to the line of the ledge. The Richards lot comes right down into the ravine. The rock in the vicinity of the old works would average $20 a ton, and we took out four or five hundred tons. A reasonable quantity of surface for the convenient working of the ledge should not be less than three hundred feet.

Where we sank an incline was, maybe, 60 or 70 feet north from the old Sigourney incline. The field was never planted in grape vines. We did not cut the roots of the trees. We cut up a big pine tree. There was some grass where we sunk our shaft and run our dumps. We put up a four-stamp mill and some hoisting works. We crushed the rock and ran the water and debris into this field and ravine.

27 PHILIP MANUEL testified: I have known the Wagner ledge since 1851; am a miner and worked on the ledge in 1851 and 1852 for Wagner. The miners were then in the habit of working all the surface ground they wanted to claim. The rock we took out was pretty good rock. I picked a piece that had fifty cents' worth of gold in it. The ledge had the appearance of a valuable ledge. I found it very valuable in the end of the tunnel. I ran to the ledge where the Andrews house afterward stood.

J. S. RAYMOND testified: I have resided near the Sigourney incline shaft since 1856 and know that Sigourney and Company suspended work in the winter of 1868, because it was idle for a year before I went there in March, 1870. The incline shaft then stood open and was caving in; about 150 feet of it was all right. After the incline was abandoned I saw Bigelow doing work there in 1870 on the northwest part of the Hanlin lot. I filled up the Sigourney incline in 1872, in February or March. Nothing marks its present site. I built a stone wall over it. Prior to the work by Sigourney & Co. I know of Lovey working there at various times from 1856 to 1865. Potter put some trees on his lot in 1862. I don't know as there has been any planted since. Grape vines were planted on a portion of the ledge; some of the old Potter lot or Richards lot has been planted in hay and grain.

J. C. RICH testified: I have resided at Nevada City since 1852; have known the Wagner ledge for 25 years or more; resided
28 for a number of years at the Half-Mile House, about three hundred feet from the Richards lot. I don't recollect anybody working the ledge before Sigourney. It seems to me he worked along between 1865 and 1870. Since Sigourney quit the surface of the ground was cultivated and put in gardens and a vineyard. I do not know of any mining claim being staked out by metes and

bounds, and think I would have known it if there had been such staking out. I know that George Smith worked on this Wagner ledge after 1869. I know where he worked.

Q. On this same Wagner ledge?

Counsel for plaintiffs objected to this question as irrelevant, incompetent, and immaterial. The court sustained the objection.

The foregoing is the substance of all of the testimony adduced upon the trial of said cause.

Defendants specify the following grounds upon which they will rely in support of their motion for a new trial herein:

1st. The court erred in refusing to allow the defendants to prove the fact and date of the sale and conveyance of the interest of William Hughes, deceased, in the Wagner ledge.

2nd. The decision is against law in adjudging that plaintiffs are entitled to recover the possession of the Dower quartz mine from the defendants.

3d. That the decision is against law in failing to find upon the issue tendered by the answer as to whether or not the work, dump, and working materials of fhe defendant Harriet Dower were
29 within the limits of the prior actual occupation of said ledge for mining purposes before the issuance of the town site to the city of Nevada.

4th. That the decision is against law in failing to find upon the issue tendered by the answer as to whether or not the said Wagner ledge was a part of the public mineral lands of the United States and reserved as such from the operation of said town-site patent.

5th. That the decision is against law in adjudging that the parties working said lode prior to the issuance of said town patent were mere trespassers upon the public domain.

6th. The evidence does not sustain the finding that work was abandoned on said Wagner ledge prior to the issuance of said town-site patent.

7th. The evidence does not sustain the finding that there was no mine or mining claim or mining possession on said Wagner ledge at the time of the issuance of said town-site patent.

8th. The evidence does not sustain the finding that Phillip Richards was the owner of or entitled to the possession of all of lots six and seven, in block forty-three. On the contrary, it shows that he was not the owner of or entitled to the possession of said Wagner ledge or of said Dower quartz mine or any part thereof.

9th. The evidence does not sustain the finding that said Phillip Richards was in possession of all of said lots. On the contrary, the evidence does not show that he was ever in the possession of any part of said quartz mine or ever worked the same or any part thereof.

30 10th. The evidence does not sustain the finding that plaintiffs, as executors, have the title and right of possession of the portion of said lots included in said Dower quartz mine.

The defendants' notice of motion for new trial, embodying as grounds thereof insufficiency of the evidence to justify the decision of

the court; that the decision of the court is against law, and error in law occurring at the trial and excepted to by the defendants, and notifying plaintiffs that the motion would be made upon a statement of the case, was filed and served in due time, and in due time thereafter defendants served their statement and plaintiffs their counter-statement, which has been agreed to and embodied in the foregoing statement, which is agreed to as correct this 21st day of Dec., 1888.

H. L. GEAR,
*Attorney for Defendants.*
GAYLORD & SEARLS AND
CROSS & SIMONDS,
*Attorneys for Plaintiffs.*

The foregoing statement is hereby allowed and settled and is hereby certified to be correct this 21st day of Jan'y, 1889.

E. A. BRIDGFORD, *Judge.*

Service of within statement acknowledged this 12th day of November, 1888.

CROSS & SIMONDS AND
FRED. SEARLS,
*Attorneys for Pl'ffs.*

Filed January 22nd, 1889.

J. L. MORGAN, *Clerk.*

31 *Order Denying Motion for New Trial.*

(Title of court and cause.)

Motion for new trial of the above-entitled cause having heretofore been submitted, after due consideration it is ordered that said motion be, and the same is hereby, denied.

Dated January 21st, 1889.

E. A. BRIDGFORD, *Judge.*

Endorsed: Filed Jan. 22d, 1889. J. L. Morgan, clerk.

*Notice of Appeal.*

(Title of court and cause.)

The plaintiffs in the above-entitled action are hereby notified that the defendants in said action appeal to the supreme court of the State of California from the judgment heretofore made and entered in said action on the 29th day of Sept., 1888, and from every part thereof, and also from the order made and entered in said action on the 21st day of Jan., 1889, denying defendants' motion for a new trial of said action.

H. L. GEAR,
*Attorney for Defendants.*

Endorsed: Filed Jan. 23d, 1889. J. L. Morgan, clerk.

Service of copy of within admitted this 23d day of January, 1889.

CROSS & SIMONDS AND
FRED. SEARLS.
*Attorneys for Plaintiffs.*

32 *Stipulation.*

(Title of court and cause.)

It is agreed that the foregoing is a full, true, and correct copy of the judgment-roll, statement on motion for new trial, order denying motion for a new trial, and notice of appeal in the above-entitled cause, and that the same constitutes the full transcript on appeal in said cause. It is further agreed that an undertaking on appeal in due form has been properly filed.

Dated ——, —.

H. L. GEAR,
*Attorney for Appellants.*
FRED. SEARLS,
*Attorney for Respondents.*

33 Due service of the within is hereby admitted this 26th day of February, 1889.

(Signed) FRED. SEARLS,
*Att'y for Respondents.*

34 *Submission of Cause.*

In the Supreme Court, State of California. In Bank.

RICHARDS *et al.*
*v.*
DOWER *et al.* } 13107.

1889, May 10th.—Cause argued by Gear for appellant-, Simonds for respondent-; ordered respondent- have 15 days to file brief; appellant- 10 days to reply; cause to be thereupon submitted.

Title of court and cause.

1889, June 3d.—Filed appellants' brief in reply and submitted.

35 In the Supreme Court of the State of California. In Bank.

WM. G. RICHARDS *et al.*, Respondents,
*vs.*
JOHN DOWER *et al.*, Appellants. } No. 13107. On Appeal from the Superior Court in and for the County of Nevada.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opin-

ion of the court herein is delivered by Beatty, C. J. We concur: McFarland, J.; Works, J.; Sharpstein, J.; Thornton, J.; Paterson, J.

Whereupon it is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of Nevada in the above-entitled cause be, and the same are hereby, affirmed.

36 *Opinion.* (*Filed October* 1, 1889.)

In the Supreme Court of the State of California. In Bank.

RICHARDS *et al.*, Respondents,
*vs.*
DOWER *et al.*, Appellants. } No. 13107.

This is an action to recover two lots in the city of Nevada. Plaintiffs had judgment, from which and an order denying a new trial defendants appealed.

The facts out of which the case arises are as follows: A patent for the town site of Nevada was issued by the United States July 1, 1869, and whatever title to these lots passed by the patent was vested in the plaintiffs at the commencement of the action.

But the defendants claim that the portion of the lots which is in their possession was not granted by the patent, being reserved or excepted out of its operation by reason of the fact, by them alleged, that it contained a gold-bearing quartz vein, the existence of which was known at and before the date of the patent, and which has since that date been located by them in pursuance of the mining laws of the United States.

From this general statement it will be seen that the question to be decided is whether or not the premises in controversy were reserved out of the land patented for a town site. The determination of this question involves a construction of the laws of the United States relating to town sites and mineral lands and a consideration of the state of facts existing and known at the date of the patent.

And first as to the facts. It appears from the findings of the superior court and from the evidence that for many years prior to the year 1869 a gold-bearing quartz ledge was known to exist within the limits of these lots, extending across the lots and for a considerable distance outside of them. As early as the year 1851 it was known as the Wagner ledge, and was worked apparently at a profit by a man of that name. It does not appear that the vein or any part of it was ever regularly located in accordance with the law or local miners' rules prior to the town-site patent or that any title or right of possession in it was ever transferred by deed or other mode of conveyance from one to another of the various parties who at different times have mined upon it. The defendants do not pretend to connect themselves in any way with those who mined there prior to the issuance of the town-site patent.

After Wagner ceased to work on the vein other parties in succession worked there from time to time until the winter of 1868–'69, at which time and prior to the issuance of the patent, according to the

findings, work on the ledge was abandoned, and none was thereafter performed until defendants, in 1884, made the location under which they claim.

It is contended by the appellants that this finding is in conflict with the evidence, and it is true that one witness did testify that he saw "a man named Smith" at work on the vein after 1869—perhaps as late as 1876. His testimony, however, was extremely vague and uncertain. He could not fix the time when or the place where he saw Smith at work. He says it was on the vein, but not inside of these lots, and was perhaps as much as four hundred yards distant from them; but, even if his testimony had been much more positive than it was, we cannot say that the court would have been bound to accept it. The fact sought to be established—viz.: the working of a gold mine within the limits of a populous town—would necessarily, if a fact, have been known to many persons, and, considering the important effect attributed to it, ought to have been proved by stronger evidence than the uncertain testimony of one witness.

But, aside from this, the question here is as to the existence of a mine known at the date of the patent within the boundaries of these lots, and even if it had been clearly proved that one man worked on the Wagner vein as late as 1876 at a point 400 yards outside of the lots that would have been a circumstance of very slight evidentiary value with reference to the matter to be proved. He might have found nothing where he was at work, and if he did find gold in paying quantities at that point it would not have proved that the same grade of ore was to be found at a distance of 400 yards. It is well known that veins rich at one point are often barren at a few yards distance. But what is more to the purpose here is that veins are frequently worked out and abandoned from point to point on their course until they are wholly exhausted. The evidence in this case shows that the Wagner vein was scarcely more than a foot in thickness; that some hundreds of tons of rock had been extracted from it within the boundaries of these lots prior to 1869; that it had been worked down to the water line by means of shafts, drifts, tunnels, etc. Add to this the fact that from 1869 to 1884, a period of more than fifteen years, it lay idle and untouched in the midst of one of the busiest and most enterprising mining regions of the State, and the conclusion is irresistible that from the time work on it ceased, in the winter of 1868–69, it was regarded as a worked-out and valueless lode, so much of it at least as was embraced within the lines of these lots.

It is true there is no express finding of the superior court to this effect, and the judgment for plaintiffs seems to have gone upon other grounds, but certainly the evidence would have sustained such a finding if an issue upon the specific point had been raised by the pleadings. There was, however, no such issue. The complaint merely alleges ownership and right of possession, which is denied by the answer. The answer, it is true, goes further than a mere denial, and attempts to state a special defense by averring that plaintiffs have no right except under the town-site patent, and that he

demanded premises were reserved in the patent. But the only allegation of fact upon this point is "that the said Wagner ledge and the portion thereof which crosses the said lands was known to be a gold-bearing ledge, and was held, possessed, worked, and mined as such long prior and subsequent to said patent." Other allegations to the effect that the mine was reserved; that it is part of the public mineral lands of the United States, etc., are mere conclusions of law. It was unnecessary, therefore, for the court to make a specific finding as to the value of the mine or its supposed value at the date of the patent. The fact that it was of no apparent value at that date will, if necessary to support the judgment, be deemed to be embraced in the more general findings in response to the issues raised.

Assuming, then, that at the date of the issuance of the town-site patent that part of the Wagner ledge embraced in these lots was regarded as worked out and as of no further value for mining purposes, we find that the predecessors of plaintiffs purchased the lots from the patentee, went into possession of them, fenced them, divided them into different enclosures, built valuable houses and outhouses upon them, planted them with fruit trees, filled up the old mining excavations, and, in short, devoted them to the purposes of a home.

After fifteen years and more, during which there was a complete cessation of mining on the lode, the defendants entered upon the possession of the plaintiffs, made a location of the ledge, claiming 300 feet of surface on each side of the croppings—a strip 600 feet in width across plaintiffs' lots—and proceeded to dig up their garden and orchard, demolish their fences, and undermine their houses.

All this the defendants justify upon the ground that the ledge and adjacent surface which they have located was reserved by the United States out of the land patented to the town-site trustee. It remains to consider whether they are correct in their construction of the law upon this point.

They rely upon the following clause of section 2392 of the Revised Statutes of the United States:

"No title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar, or copper or to any valid mining claim or possession under existing laws."

This clause of the Revised Statutes had no existence in its present form at the date of the patent of the Nevada town site. At that date the revision had not been made, and we must look to the town-site laws in the Statutes at Large to ascertain whether they contained equivalent provisions. The laws referred to are the act of March 2, 1867 (14 Stats. at Large, p. 541), and the act of June 8, 1868 (15 Stats. at Large, p. 67). The first contained the following proviso: "That no title shall be acquired under the provisions of this act to any mine of gold, silver, cinnabar, or copper." The second, which was amendatory of the first, contained the following proviso: "That no title under said act of March 2, 1867, shall be acquired to any valid mining claim or possession held under the existing laws of Congress."

The appellants contend that in July, 1869, both these provisos were in force. The respondents, on the contrary, claim that the sec-

ond was substituted for the first, and that nothing was reserved at the date of the patent in question except "valid mining claims or possessions held under existing laws of Congress."

We find it unnecessary to decide which of these opposing views is correct. For the purposes of this case we will assume, without deciding, that the appellants are right, and that not only mining claims, but all known mines, whether claimed or not, were reserved from the grant.

The question, then, is reduced to this: What was a mine of gold within the meaning of the act of 1867? Without the aid of any judicial or legislative construction we should say without hesitation that one essential requisite of a gold mine would be a natural deposit of rock or earth containing a sufficient quantity of gold to admit of profitable working. If lands are known to contain precious metals, but in quantities so small as not to justify the attempt to extract them, they are not properly called mineral lands; and even if they might be mined at a very small profit, but are clearly of more value for agriculture than for mining, they are agricultural rather than mineral lands.

There is abundance of authority for this view. We know of nothing in the statutes of the United States as they existed in July, 1869, which indicates a more jealous policy with respect to mineral lands than is manifested by the following provision of the Revised Statutes: "In all cases lands valuable for minerals shall be reserved from sale except as otherwise expressly directed by law." (Sec. 2318.) This is a clear declaration that the present policy of the Government is to reserve only such mineral lands as are valuable as such, and there is no reason to suppose that it ever had a different policy.

In the case of Deffenback *vs.* Hawke (115 U.S., 392)—a case much relied on by appellants—although the decision was in favor of the mineral claimant, who held a patent, for his mine and against the town-lot claimant, who had no patent, the carefully guarded language of the opinion of the court limiting the operation of the principles decided has all the force of a direct adjudication against the appellant on the point we are considering. We quote the following, p. 404:

37 "It is plain, from this brief statement of the legislation of Congress, that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the pre-emption or homestead laws or the town-site laws or in any other way than as prescribed by the laws specially authorizing the sale of such lands. * * * We say 'land known at the time to be valuable for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable. In the first section of the act of 1866 no designation is given of the character of mineral lands which are free and open to exploration. But in the act of 1872, which repealed that section and re-enacted

one of broader import, it is 'valuable mineral deposits' which are declared to be free and open to exploration and purchase. The same term is carried into the Revised Statutes. It is there enacted that 'lands valuable for minerals' shall be reserved from sale, except as otherwise expressly directed, and that 'valuable mineral deposits' in lands belonging to the United States shall be free and open to exploration and purchase. We also say lands known at the time of their sale to be thus valuable in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land in which, years afterward, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the Government under the pre-emption laws, may be found years after the patent has been issued to contain valuable minerals. Indeed, this has often happened. We therefore use the term 'known to be valuable at the time of sale' to prevent any doubt being cast upon titles to lands afterward found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued."

And again, on pages 406–'7, note the following language: "Whilst we hold that a title to known valuable mineral land cannot be acquired under the town-site laws, and therefore could not be acquired to the land in controversy under the entry of the town site of Deadwood by the probate judge of the county in which the town is situated, we do not wish to be understood as expressing any opinion against the validity of the entry, so far as it affected property other than mineral lands, if there were any such at the time of the entry. The acts of Congress relating to town sites recognize the possession of mining claims within their limits; and in Steel *vs.* Smelting Co., 106 U. S., 447, 449, we said that 'land embraced within a town site on the public domain, when unoccupied, is not exempt from location and sale for mining purposes; its exemption is only from settlement and sale under the pre-emption laws of the United States. Some of the most valuable mines in the country are within the limits of incorporated cities, which have grown up on what was at its first settlement part of the public domain; and many of such mines are located and patented after a regular municipal government had been established. Such is the case with some of the famous mines of Virginia City, in Nevada. Indeed, the discovery of a rich mine in any quarter is usually followed by a large settlement in its immediate neighborhood, and the consequent organization of some form of local government for the protection of its members.' It would seem, therefore, that the entry of a town site, even though within its limits mineral lands are found, would be as important to the occupants of other lands as if no mineral lands existed. Nor do we see any injury resulting therefrom nor any departure from the policy of the Government, the entry and the patent being inoperative as to all lands known at the time to be valuable for their minerals or discovered to be such before their occupation or improvement for residence or business under the town-site title."

These extracts from the opinion of the highest judicial tribunal of

the country show very clearly and precisely what are the limitations upon the rights which the defendants are attempting to assert, and what is the effect of the provisos above quoted reserving mineral lands, mines, and mining claims from the operation of town-site patents. A mine is not reserved unless it is not only known to be valuable at the date of the patent or discovered to be so before the occupation or improvement of the lots containing them for residences or business under the town-site title.

Here the defendants admit that the lots in controversy are within the description of the patent, and they must assume, as they have in fact done, the burden of showing that they are of the class of lands excepted from its operation.

This they have failed to do, both in their allegations and in their proofs, by failing to show that that portion of the Wagner ledge included within the boundaries of these lots was known to be valuable for mining purposes at the date of the patent, or discovered to be so before plaintiffs and their predecessors occupied and improved them for the purposes of residence under the town-site title.

The tacit assumption upon which appellants base their whole argument, viz., that this ledge, having once been profitably worked, must be deemed to have continued valuable, cannot be admitted. It is a matter of universal knowledge that California is full of quartz veins which have been worked at a profit for a time and have been finally abandoned—often after sinking more money in them than had ever been taken out of them—and there are large areas where placer mining was formerly conducted successfully, which now, after being exhausted of their gold, are held and occupied as farming and grazing lands under patents from the United States. When upon lands of this character mineral discoveries are made the agricultural claimant is protected against mining locators. (Cowell *vs.* Lammers, 10 Saw., 246.)

The foregoing views dispose of the main contention of the parties to this appeal, but we will notice briefly some specific assignments of error.

The finding of the court that work on the ledge was abandoned prior to the issue of the town-site patent is not contrary to the evidence. Our reasons for this conclusion have been already stated.

The *possessio pedis* of Hughes and Lovey and Sigourney & Co. of the shafts, tunnels, inclines, dumps, and stopes on the vein, even if it had actually continued down to the date of the patent—and it is not shown to have done so—would not have had the effect of preventing the land in which they were situated from passing by the town-site patent. If there was no mine of value, and if they had abandoned all work on the mine, as the evidence shows they had done, their possession of the shafts, dumps, etc., would not have amounted to a mining claim, and nothing but a mine or a mining claim was reserved. Beside, the evidence was sufficient to prove an actual intention of these old miners to abandon the mine at the time they ceased to work it, in the winter of 1868–'69.

The court did not err in excluding evidence offered to show that in 1871, after the death of Hughes, his interest in the Wagner ledge

was sold under proceedings in probate for $500. The most that such evidence could possibly have proved was that the purchaser, two years after the patent, thought that Hughes had an interest in the vein, which was worth $500. As we have seen, the vein extended far beyond these lots, and, according to one witness, was worked at a point 400 yards distant from them in 1876 or thereabouts. Hughes' claim may have included this portion of the vein, but whatever it included the opinion of the purchaser two years after the patent is not competent evidence of the known or estimated value of the vein at the date of the patent.

We find no error in the record.

Judgment and order affirmed.

BEATTY, *C. J.*

We concur:

McFARLAND, *J.*
WORKS, *J.*
SHARPSTEIN, *J.*
THORNTON, *J.*
PATERSON, *J.*

38 In the Supreme Court of the State of California.

WM. G. RICHARDS *et al.*, Respondents,
*v.*
JOHN DOWER *et al.*, Appellants.
} Case No. 13107.

*Supersedeas Bond.*

Know all men by these presents that we, the undersigned, citizens of the State of California and residents of the county of Nevada, in said State, are jointly and severally held and firmly bound unto Wm. G. Richards, Francis S. Richards, and James Bennallack, executors of the last will and testament of Philip Richards, deceased, in the sum of one thousand dollars; the payment of which, well and truly to be made unto said executors, we do bind ourselves, our executors and administrators, firmly by these presents. Sealed with our seals and dated this 15th day of November, 1889.

The conditions of the above obligation is such that whereas John Dower, Harriet Dower, John Doe and Richard Roe, John Denn, and Richard Fenn, the appellants to the supreme court of the
39 State of California in the above-entitled action, have prosecuted and are prosecuting a writ of error to review the decision of said court, rendered Oct. 3d, 1889, by said supreme court, in the Supreme Court of the United States; and whereas the chief justice of the supreme court of the State of California has allowed said writ of error and has fixed the amount of bond, to operate as a supersedeas and stay of proceedings pending the determination of said writ of error, at the sum of $1,000: Now, therefore, if the said plaintiffs in error shall prosecute the said writ of error to effect and if they shall fail to make their plea good and shall answer and pay to the defendants in error all damages and costs which may accrue to them by reason of the prosecution of said writ of error, then the

above obligation is to be void; otherwise it is to be and remain in full force and effect.

Witness our hands and seals the day and year first above written.

ISRAEL HOSKEN. [SEAL.]
THOMAS H. WATERS. [SEAL.]
J. H. RICHARDS. [SEAL.]
C. J. NAFFZIGER. [SEAL.]

40 STATE OF CALIFORNIA, } ss:
*County of Nevada,* }

ISRAEL HOSKEN, THOMAS H. WATERS, J. H. RICHARDS, and C. J. NAFFZIGER, the sureties upon the foregoing undertaking, being duly sworn, depose and *and* say, each for himself, that they are each residents and householders or freeholders within the State of California and are each worth the sum specified in said undertaking over and above all their just debts and liabilities, exclusive of property exempt from execution.

ISRAEL HOSKEN.
T. H. WATERS.
J. H. RICHARDS.
C. J. NAFFZIGER.

[SEAL.]

Subscribed and sworn to before me this 15th day of Nov., A. D. 1889.

J. L. MORGAN,
*Clerk Superior Court, Nevada County, Cal.*

Endorsed: Supreme court of California. No. 13107. Richards *et al.*, respondent-, *v.* Dower *et al.*, appellant-. Supersedeas bond upon writ of error. The within bond is approved this 25th day of Nov., 1889. W. H. Beatty, chief justice supreme court of California. Filed Nov. 25, 1889. J. D. Spencer, clerk, by Frank Myers, deputy.

41 In the Supreme Court of the United States.

JOHN DOWER *et al.*, Plaintiffs in Error,
*vs.*
WM. G. RICHARDS *et al.*, Defendants in Error.

*Assignment of Error.*

The said plaintiffs in error assign the following errors as having been committed by the supreme court of the State of California in its decision of the cause of Wm. G. Richards *et al. v.* John Dower *et al.*, appealed thereto from the superior court of Nevada county by the defendants in said cause:

1st. The said supreme court erred in not rendering judgment in favor of the appellants in said cause upon the findings of said superior court and in not reversing the judgment rendered by said superior court upon said findings.

2d. The said supreme court erred in not reversing the order of

said superior court refusing a new trial to the defendants in said action.

42 3rd. The said supreme court erred in deciding that the said superior court had not erred in refusing to allow defendants to prove the fact and date of the sale and conveyance of the interest of William Hughes, deceased, in the Wagner ledge.

4th. The said supreme court erred in deciding that the decision of said superior court was not against law in adjudging that the plaintiffs were entitled to receive the possession of the Dower quartz mine from the defendants in said action.

5th. The said supreme court erred in deciding that the decision of said superior court was not against law in failing to find upon the issue tendered by the answer as to whether or not the work, dump, and working materials of the defendant Harriet Dower were within the limits of the prior actual occupation of said ledge for mining purposes before the issuance of the town-site patent to the city of Nevada.

6th. The said supreme court erred in deciding that the decision of said superior court was not against law in failing to find upon the issue tendered by the answer as to whether or not the

43 said Wagner ledge was a part of the public mineral lands of the United States and reserved as such from the operation of of said town-site patent.

7th. The said supreme court erred in deciding that the decision of said superior court was not against law in adjudging that the parties working the said lode prior to the issuance of said town-site patent were *were* trespassers upon the public domain.

8th. The said supreme court erred in deciding that the evidence adduced upon the trial of said action in said superior court was sufficient to sustain the findings of said superior court that work was abandoned on said Wagner ledge prior to the issuance of said town-site patent; that there was no mine or mining claim or mining possession on said Wagner ledge at the time of the issuance of said town-site patent, and that Philip Richards was the owner of and entitled to the possession of all of lots six and seven, in block forty-three, and was in possession of all of said lots, and that plaintiffs, as executors, have the title and right of possession of the portion of said lots included in said Dower quartz mine, whereas the said

44 plaintiffs in error claim the truth to be that neither of said findings was sustained by the evidence adduced before said superior court, but were each and all of them contrary thereto.

H. L. GEAR,
*Attorney for Plaintiff- in Error.*

Endorsed: 13107. In the Supreme Court of the United States. John Dower *et al.*, plaintiff- in error, *vs.* Wm. G. Richards *et al.* Assignment of errors. Filed Nov. 25, 1889. J. D. Spencer, clerk, by Frank Myers, deputy.

45 UNITED STATES OF AMERICA, *ss:*

To Wm. G. Richards, Francis S. Richards, and James Benallack, executors of the last will and testament of Philip Richard, deceased, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1890, pursuant to a writ of error allowed by the chief justice of the supreme court of the State of California, returnable to the said Supreme Court of the United States on said day, and directed to the justices of the supreme court of the State of California, in a cause wherein you were plaintiffs and respondents and John Dower, Harriet Dower, John Doe, Richard Roe, John Denn, and Richard Fenn were defendants and appellants in said State supreme court, wherein said defendants and appellants claimed a right, title, and privilege under the statutes of the United States, and the decision of said State supreme court was against the said right, title, and privilege, and whereby the said defendants and appellants are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the decision of said State supreme court in the said cause above mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of California.

Witness the Honorable W. H. Beatty, chief justice supreme court of California, this 6th day of November, A. D. 1889, and of the Independence of the United States the one hundred and fourteenth.

Attest:

J. D. SPENCER, *Clerk*,
By BEN. M. MADDOX,
*Deputy Clerk.*

[Endorsed:] 13107. In the Supreme Court of the United States. John Dower *et al.*, plaintiffs in error, *vs.* Wm. G. Richards *et al.*, defendants in error. Citation. Filed Nov. 25, 1889. J. D. Spencer, clerk, by Frank Myers, deputy.

Service of the within citation is acknowledged this 15th day of Nov., 1889.

P. F. SIMONDS &
FRED. SEARLS,
*Attorneys for Wm. G. Richards, Frank S. Richards, and James Benallack, Executors of Will of Philip Richards, Deceased.*

46 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court, before you, between Wm. G. Richards, Francis S. Richards, and James

Bennallack, executors of the last will and testament of Philip Richards, deceased, plaintiffs and respondents, and John Dower, Harriet Dower, John Doe, Richard Roe, John Denn, and Richard Fenn, defendants and appellants, wherein the said defendants and appellants claimed a right, title, and privilege under the statutes of the United States, and your decision thereof is against said right, title, and privilege, a manifest error hath happened to the great damage of the said defendants and appellants, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said U. S. Supreme Court to be there and then held, that, the record and proceedings aforesaid be inspected, the said U. S. Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 6th day of November, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

Seal U. S. Circuit Court, Northern Dist. Cal.

L. S. B. SAWYER,
*Clerk U. S. Circuit Court, Nor. Dist. Cal.*

W. H. BEATTY,
*Chief Justice of the Supreme Court of the State of California.*

[Endorsed:] 13107. United States Supreme Court to State supreme court of California. John Dower *et al.*, plaintiffs in error, *vs.* Wm. G. Richards *et al.*, defendants in error. Writ of error. Filed Nov. 6, 1889. J. D. Spencer, clerk, by J. J. Paulrell, deputy.

47 *Clerk's Certificate.*

In the Supreme Court of the State of California.

JOHN DOWER *et als.*, Plaintiffs in Error,
*vs.*
WM. G. RICHARDS *et al.*, Defendants in Error. } No. 13107.

I, J. D. Spencer, clerk of the supreme court of the State of California, do hereby certify that the foregoing forty-six pages, numbered from one to forty-six, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the cause above entitled, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of the said supreme court this 27th day of May, 1890.

Seal Supreme Court of California.

J. D. SPENCER, *Clerk*,
By BEN. M. MADDOX,
*Deputy Clerk.*

Endorsed on cover: California supreme court. No. 1279. John Dower, Harriet Dower, John Doe, Richard Roe, John Denn, & Richard Fenn, plaintiffs in error, *vs.* William G. Richards, Francis S. Richards, & James Bennallack, executors of Philip Richards, deceased. Filed September 12, 1890.

Office Supreme Court U. S.
FILED.
DEC 15 1893
JAMES. H. McKENNEY.
CLERK.

1278

# SUPREME COURT OF THE UNITED STATES.

No. 1,279.

JOHN DOWER ET AL.,
*Plaintiffs in Error,*

*vs.*

WILLIAM G. RICHARDS ET AL.,
*Defendants in Error.*

# BRIEF OF PLAINTIFFS IN ERROR.

H. L. GEAR,
*Attorney for Plaintiffs in Error.*

GEO. SPAULDING & CO., PRS., 414 CLAY ST., SAN FRANCISCO.

# IN THE SUPREME COURT

OF THE

# UNITED STATES.

JOHN DOWER AND HARRIET DOWER,

PLAINTIFFS IN ERROR,

*vs.*

WM. G. RICHARDS ET AL.,

DEFENDANTS IN ERROR.

## BRIEF FOR PLAINTIFFS IN ERROR.

### I.

### Statement of the Case.

This is a writ of error to the Supreme Court of the State of California to reverse a judgment of that Court affirming the judgment of the Superior Court of Nevada County, in that State, in an action of ejectment brought in that Court by the defendants in error, as executors of Philip Richards, deceased, against the plaintiffs in error, and in affirming the order of said Superior Court overruling the defendants' motion for a new trial in said action.

The complaint in the Superior Court contains the usual averments made in an action of ejectment. The answer denies the ownership of the plaintiffs, and avers that Harriet Dower is the owner of, and in possession of, and entitled to the possession of a certain quartz ledge and mine situated partly upon the premises sought to be recovered, known as the Dower Quartz Mine, and formerly known as the Wagner Ledge, and avers that Phillip Richards in his lifetime had no other right of possession of the lands described in the complaint than was derived from the townsite patent of the United States, granted to the city of Nevada in the year 1869; and alleges that the said Wagner ledge, and the portion thereof which crosses said land, was known to be a gold bearing ledge and was held, possessed, worked and mined as such long prior and subsequent to the said patent; and was by the laws of the United States reserved from the operation of said patent, and is a part of the public min-

eral land of the United States; that the said Harriet Dower has located a portion of said ledge under and pursuant to the laws of the United States, and is engaged in working and mining the same as a citizen of the United States, pursuant to its laws; that the mineral location of said Harriet Dower is known as and called the Dower Mine, and crosses the land claimed by plaintiff; and that defendants have no possession or occupation of any part of said lands other than the said quartz ledge, and the surface land adjacent thereto for working purposes; that no mining or work of any kind has been done by them, excepting upon the said ledge, within the limits of the ground claimed by said plaintiffs, and none has been done thereon outside of the limits allowed by the local mining rules which were in force in Nevada City Mining District, in the year 1869; that said mining rules then and prior to that year, allowed of the occupation of one hundred feet upon each side of a quartz ledge for working purposes; that said mining rules are not now in force, and that the mineral location of said Harriet Dower includes, as it lawfully may, the space of three hundred feet on each side of said ledge for working purposes; that said location was made in the year 1881, after prior locations had lapsed by failure to do annual work; but that the said Harriet Dower has not actually ousted said Phillip Richards or said plaintiffs from any part of the surface of said lands, excepting a place upon the line of said ledge, where they have sunk a shaft directly upon the ledge, at a point which was actually held and worked for mining purposes by citizens of the United States prior to the said townsite patent, and that the dump and working materials of said Harriet Dower are all within the limits of such prior occupation for mining purposes; Defendants aver that the said John Dower, and the other defendants herein, have no other possession or occupation of any part of said premises other than as servants of said Harriet Dower in the working of said mine. (Record, pp. 3, 4.)

The Superior Court found that a townsite patent to certain lands, including the land in controversy, was granted to the city of Nevada by the government of the United States on the first day of July, 1869; that said Richards held said lots as grantee of the city of Nevada under said townsite patent, and continued to be the owner thereof at the time of his death; that his title passed to the plaintiffs as his executors; that they have valuable improvements upon the lots; that a quartz ledge formerly known as the Wagner ledge crosses said premises; that said ledge was known and worked by various parties as a gold bearing ledge for many years prior to 1868; and was prior to

the time of the issuance of the patent worked by means of tunnels, shafts, inclines and stopes, and that many tons of gold bearing rock were extracted therefrom, and that said ledge was profitably worked; that the ledge was never located, or marked with boundaries upon the ground; that the parties working the lode were mere trespassers upon the public domain, having only a *possessio pedis* of certain shafts, tunnels and dumps; that work was abandoned on said Wagner ledge in the winter of 1868-9, and prior to the issuance of said patent, and no labor was thereafter performed by former claimants or their grantees, and that defendants are not the grantees of any parties working said Wagner ledge prior to the patent; that the Wagner ledge bearing gold was known to exist on said lots prior to the granting of the townsite patent, but there is no proof that there was any location or any mine or mining claim or mining possession thereon at the time of the issuance of the patent; that in 1884 the defendant, Harriet Dower, was a citizen of the United States, and attempted to make a quartz mining location upon said Wagner lode within the limits of said lots, which location conformed with the requirements of the laws of the United States in respect to mining locations, by which she claimed said quartz ledge, with three hundred feet on each side thereof, and has since done all annual work upon said ledge required by the laws of the United States; and that no annual work had been done thereon for more than a year by any prior claimant; and that John Dower has no other possession than as servant of said Harriet Dower. (Record, pp. 4–6.)

The evidence pertinent to the claims of the plaintiffs in error, discloses a stipulation as to some of the facts embodied in the findings, including the fact of profitable work on the Wagner ledge for many years prior to 1868, and the location of the ledge by Harriet Dower in 1884, and the doing of annual work thereon (Record, p. 8). It appears without conflict of evidence that the defendants had erected a four-stamp quartz mill, in which they crushed rock hoisted from a shaft which they sunk (*Id.*, pp. 9, 13), and that the point where they commenced to sink was a point where sinking had been done by parties prior to 1869 in an open lot where there were no improvements there being a fence between the works and the Richards house. After sinking the incline about 60 feet they broke into an old incline, and found that the rock in the vicinity of the old works would average $20 a ton, and took out four or five hundred tons of the rock (Record, p. 13).

It further appeared that the Wagner ledge was first occupied and worked by the Wagner Brothers in 1851, and that in 1858,

a tunnel five or six hundred feet long was run into the ledge by Hughes and Lovey, and some rock taken out which would pay thirty-five and forty dollars a ton; that the lowest grade of rock which it would pay a practical miner good profitable wages for taking it out and crushing in that mine, would be about seven dollars a ton; that afterwards the Sigourney Company worked in the same lot now claimed by the Richards estate, and sank an incline on the ledge in which they took out ore yielding from ten to fifteen and twenty dollars per ton; that the tunnel run by Hughes and Lovey extended under the same lot and went to the other side of it into the Bigelow lot; that the Wagner Bros. worked in the Davenport lot adjoining the Richards lot and took out about 450 tons of rock; that a notice of location was posted on the Wagner ledge on a pine tree about three or four hundred feet below the Richards lot; that the ground was not staked out and there were no mining rules or customs in existence; that the custom of miners was to run a tunnel where they wanted to, going sufficiently far down the hill, for that purpose; that the Hughes and Lovey tunnel ran in between two and three hundred feet from the line of the ledge; that the Wagner ledge in the lower tunnel is two and a half feet thick, its average being about twenty inches; that the gold is found all in the ledge and gouge, and all that is valuable for gold is in the ledge itself; that Davenport bought of the Hughes estate. (Record, pp. 10, 11.)

Defendants offered to prove by the records of Nevada County that the interest of Wm. Hughes, deceased, in the Wagner ledge was sold and conveyed by the order of the Probate Court of said county for $500 on June 26, 1871, to S. V. Davenport and J. C. Rich, which facts appeared from said record. The evidence was excluded upon objections of plaintiffs to its materiality and relevance, to which ruling the defendants excepted. (*Id.*, pp. 11, 12.)

It further appeared without conflict of evidence that a Mr. Smith worked on the Wagner ledge in 1869 and after that year (Record, pp. 11, 14), and that a Mr. Bigelow worked on the same ledge in 1870 (Record, p. 13).

## II.

## Specifications of Error.

1. The Supreme Court of the State of California erred in affirming the judgment and order of the Superior Court.

2. The Superior Court erred in refusing to allow the defendants to prove the facts respecting the sale and conveyance of the interest of William Hughes, deceased, in the

Wagner ledge, and the said Supreme Court of said State erred in sustaining the said ruling of the Superior Court. The said offer of evidence rejected by said Superior Court consisted of the offer of defendants "to prove by the records of Nevada County that the interest of Wm. Hughes, deceased in the Wagner ledge was sold and conveyed by the order of the Probate Court of said county for the consideration of $500 in gold coin of the United States on the 26th day of June, 1871, to S. V. Davenport and J. C. Rich, which facts appear from the said records, which were offered in evidence by the said defendants (Record, pp. 11, 12).

3d. The decision of the said Superior Court is against law, in adjudging that plaintiffs are entitled to recover possession of the Dower Quartz Mine from the said defendants; and the said Supreme Court of said State erred in sustaining the said decision.

4th. The decision of the said Superior Court is against law, in failing to find upon the issue tendered by the answer as to whether or not the work dump and working materials of the defendant Harriet Dower were within the limits of the prior actual occupation of said ledge for mining purposes before the issuance of the townsite to the City of Nevada; and the Supreme Court of said State erred in sustaining said decision.

5th. The decision of said Superior Court is against law, in failing to find upon the issue tendered by the answer as to whether or not the said Wagner Ledge was a part of the public mineral lands of the United States, and reserved as such from the operation of said townsite patent; and the said Supreme Court of said State erred in sustaining said decision.

6th. The decision of said Superior Court is against law, in adjudging that the parties working said lode prior to the issuance of said town patent were mere trespassers upon the public domain; and the said Supreme Court of said State erred in sustaining said decision.

7th. The evidence does not sustain the finding of the Superior Court that work was abandoned on said Wagner Ledge prior to the issuance of said townsite patent; and the said Supreme Court of said State erred in sustaining the said finding.

8th. The evidence does not sustain the finding of the Superior Court that there was no mine, or mining claim, or mining possession on said Wagner Ledge, at the time of the issuance of said town-site patent; and the said Supreme Court of said State erred in sustaining the said finding.

9th. The evidence does not sustain the finding of the Su-

perior Court that Phillip Richards was the owner of, or entitled to the possession of, all of lots six and seven in block forty-three. On the contrary, it shows that he was not the owner of, or entitled to the possession of, said Wagner Ledge, or of said Dower Quartz Mine, or any part thereof; and the said Supreme Court of said State erred in sustaining the said finding.

10th. The evidence does not sustain the finding of the Superior Court that said Phillip Richards was in possession of all of said lots. On the contrary, the evidence does not show that he was ever in the possession of any part of said quartz mine, or ever worked the same, or any part thereof; and the said Supreme Court of said State erred in sustaining the said finding.

11th. The evidence does not sustain the finding of the Superior Court that plaintiffs, as executors, have the title and right of possession of the portion of said lots included in said Dower Quartz Mine; and the said Supreme Court of said State erred in sustaining the said finding.

## III.

## Points and Authorities.

### 1. Title to the Ledge.

The main question in the case presented by the record may be stated as follows:

*When a quartz ledge known to be gold-bearing and to have been profitably worked prior to the acquisition of a townsite patent, in the year 1869, and not then worked out, is situated within the exterior boundaries of the patent, what are the limits of the rights of the United States, in respect to such ledge, and what rights may be acquired or exercised by a subsequent mineral claimant under the laws of the United States in respect to the working and development of such ledge?*

Plaintiffs in error insist that the law upon this subject is that embodied in the following proposition:

*The rights of the Government and its mining grantees are not limited to such actual mining or tunnel possession, as may have existed before the townsite patent; or to any continuance of a mining claim or possession by prior locators or their grantees; but the Government owns and can grant the right to any quartz* MINE *or gold-bearing ledge which was* KNOWN TO EXIST *and to be valuable for minerals before the townsite patent was obtained, and which was not worked out, when the townsite patent was obtained; and*

*the rights of a subsequent locator under the Government*, BY VIRTUE OF ITS RESERVATION OF THE MINE, *and of the Mining Acts of 1866 and 1872, include* A REASONABLE QUANTITY OF SURFACE FOR THE CONVENIENT WORKING OF THE LEDGE, NOT EXCEEDING THREE HUNDRED FEET ON EACH SIDE THEREOF.

2. RESERVATION BY THE GOVERNMENT.

Sec. 2392 of the revised statutes of the United States embodies the previous legislation with respect to the reservation of mines within townsites in the following words:

"No title shall be acquired under the foregoing provisions of this chapter *to any mine* of gold, silver, cinnabar or copper, or to any valid mining claim or possession under existing laws."

The Townsite Act of Congress of March 2, 1867 (14 Stat., p. 541), expressly provided that "no title shall be acquired under the provisions of this act to any MINE of gold, silver, cinnabar, or copper." The last clause of the above section of the Revised Statutes was added by the Act of June 8, 1868 (15 Stat., p. 67.)

To construe the term "*mine*" in this reservation as synonymous with "*valid mining claim or possession*," would completely nullify the first clause of the foregoing section; evidently treating it as tautological and useless. But a "mine" is not synonymous with a "valid mining claim or possession." There may be many "mining claims" upon the same "mine," and there may be a "mine" without any "valid mining claim or possession." By *a mine*, I understand a tract of land which includes any continuous body of mineral supply, from which minerals of value may be extracted. If a quartz ledge is known to exist and to be gold-bearing, then the tract of land which includes it, and the whole ledge throughout its entire extent and ramifications, is *a mine*, whether claimed in whole or in part, or wholly unclaimed. Certainly the term "mine" cannot be limited to actual excavations or explorations, for that would involve the absurdity of limiting the reservation of the Government to a worked-out hole, without the right to make any further excavations or explorations. It is a familiar principle that grants and reservations by a government are to be construed favorably to the government.

*Bartram* vs. *Central T. Co.*, 25 Cal., 283.
*Spring Valley Water Works* vs. *San Francisco*, 52 Cal., 112.
*Charles River Bridge* vs. *Warren Bridge*, 11 Pet., 420.
*Dubuque and Pac. R. R. Co.* vs. *Litchfield*, 23 How., 66.

Construing the reservation in question in the light of this

principle, it becomes evident that the Government intended to reserve from its townsite grants each and every tract of land which immediately includes a body of valuable mineral deposits which may be known to lie in one continuous whole.

A placer mine would be the land which includes one continuous body of placer deposits; and a quartz mine would be the land which includes one continuous body of mineral-bearing quartz deposit.

This view of the law is in harmony with the views expressed by the Supreme Court of the United States, in the decisions wherein it has held that a townsite patent is inoperative and void as respects known mineral deposits of value.

In the case of *Steel* vs. *Smelting Co.*, 106 U. S., 450, the Court says:

"The acts of Congress relating to townsites recognize the possession of mining claims within their limits, and forbid the acquisition of any mine of gold, silver, cinnabar or copper within them, under proceedings by which title to other land there situated is secured, *thus leaving the mineral deposits within townsites open to exploration*, and the land in which they are found to occupation and purchase, *in the same manner as such deposits are elsewhere explored and possessed*, and the lands containing them are acquired."

In the case of *Deffeback* vs. *Hawke*, 115 U. S., p. 404, the Court says:

"No title from the United States to land *known at the time of sale to be valuable for its minerals of gold, silver or copper, can be obtained under* the pre-emption or homestead law, or *the townsite laws*, or in any other way than as prescribed by the laws especially authorizing the sale of such lands."

On pages 406 and 407 of the same decision, the Court says:

"We hold that a title to *known valuable mineral land* cannot be acquired under the townsite laws; the entry and the patent *being inoperative as to all lands known at the time to be valuable for minerals, or discovered to be such before their occupation, or improvement for residences or business under the townsite title.*"

Although the case of *Deffeback* vs. *Hawke* arose under the revised statutes of the United States, its reasoning has full application to the present case, which arises under the laws of Congress as they stood in 1869; for the provision of the section of the revised statutes above cited is nothing but a compilation of statutory provisions which were in existence prior to the year 1869. At the date of the townsite patent in question, the law declared as emphatically as it now does that no title could be acquired to *any mine* of gold, silver, cinnabar or copper by means of a townsite patent.

It is insisted that under the policy of the laws of Congress to grant its mines *as land*, the reservation of mines includes a reservation of *the land* which contains them, to such extent as is indicated by its statutory policy concerning the sale of its mines.

This position is confirmed by the construction which Congress itself has placed upon the word "*mine*," as used in its legislation. The Pre-emption Act of 1841, exempted known "*mines*" from its operation. In 1864 (U. S. Stats., Vol. 13, p. 343), Congress construed this language as applied to mines of coal, by a provision respecting "TRACTS EMBRACING COAL-BEDS OR COAL FIELDS, constituting portions of the public domain, *and which* AS 'MINES,' *are excluded from the Pre-emption Act of* 1841," thus plainly showing that in its use of the term "mine" it was intended to designate a "*tract embracing* a FIELD OR BED" of continuous mineral deposit lying in one body, without reference to any mining claim or possession, or to any number of such claims or possessions.

The Court has expressly declared that the reservation of a known MINE is not synonymous with and does not require a *mining location*.

*Iron Silver Mining Company* vs. *Mike and Starr Gold and Silver Mining Company*, 143 U. S., 394.

*Sullivan* vs. *Iron Silver Mining Co.*, 143 U. S. 431.

### 3. THE MINING ACTS OF 1866 AND 1872.

The tract of land which embraced this quartz ledge having been reserved by law from the operation of the townsite patent, the question arises, *What is the extent of that tract*, in view of the mining acts of 1866 and 1872?

It is manifest that the extent of the reserved rights of the Government must appear from its legislation prior to 1869, the date of the townsite patent, for it could not *enlarge* its own reserved rights by any subsequent grant as against the townsite patent, though it might *restrict* a grant of its reserved rights in any manner within the limits of those rights.

We must then inquire what idea of the reserved rights of the Government can be obtained from its previous legislation upon the subject of its mines.

In addition to the Act of 1864, before cited, as to the legislative construction of the word "mines," we have to consider the Mining Act of July 26, 1866, which first threw open the mineral lands of the United States to exploration, occupation and purchase by citizens of the United States, and prescribed

rules as to the location, working and extent of occupancy allowed to each appropriator of its mineral lands.

The first section of the Act of 1866, declared that "*the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be* FREE AND OPEN TO EXPLORATION AND OCCUPATION *by all citizens of the United States*, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.

Now, here is an unrestricted permission to any citizen of the United States to explore and work its mines as fully as the Government itself could do, subject only to such restrictions as might be imposed by local customs or rules, or express limitations of law. In the absence of local customs or rules, or express limitations of law, the grant is limited only by the fact of exploration and occupancy, and is co-extensive as to the rights of exploration and occupancy, wherever they may be had in fact, with the rights of the Government itself.

The fourth section of the Act of 1866 gave the right to a company of locators to locate in the aggregate not exceeding three thousand feet in length upon the vein, and conferred the right to follow the vein, *with all of its dips, variations, and angles*, TOGETHER WITH A REASONABLE QUANTITY OF SURFACE FOR THE CONVENIENT WORKING OF THE SAME, as fixed by local rules.

Here it is plain that in the absence of local rules, prescribing what is a reasonable quantity of surface for the convenient working of a mine, it would be a simple question of fact, to be determined by a Court or jury, or by the Land Department, under the circumstances of the particular case. It certainly would not be a sensible construction of the law to hold that the absence of local rules to fix the limits of reasonable occupancy would prevent any reasonable occupancy of surface for the convenient working of a mine. No such construction was ever given by any Court or by the Land Department. It is well known, as matter of public mining history, that under this law of 1866, in the absence of limitation by local rules, many acres of land and tunnels of great length were patented by the Government as being within the limits of a reasonable quantity of surface for the convenient working of a ledge.

It is obvious that the object of the law of 1872 was not to enlarge the right of surface occupation, but rather to restrict and define what was before indefinite and uncertain, so as to

prescribe by law *the limits of reasonable occupation*, and so to prevent undue extension of that right in the absence of local rules. It is true that there was a certain enlargement of right given by the law of 1872, in the grant of undiscovered veins within the limits of the surface location; but that is only an additional reason why those limits should be restricted, rather than enlarged, in their spatial extent.

Under the Act of Congress of 1866, there was a grant of authority to any citizens of the United States to explore and work its mines, and *to the use of a reasonable quantity of surface for the convenient working* of a vein, with all its dips, variations and angles, subject only to the restrictions of local rules, and to the determination of fact as to what is reasonable in the absence of such rules. This being so, it is clear that the reservation by the Government of all its mines from the operation of the townsite patent made them subject to the grant and permission to citizens of the United States, *to work them in the manner and to the extent prescribed by the Mining Act of* 1866.

The Mining Law of 1866 shows clearly that Congress attached to the *idea of a quartz mine* not only all dips, spurs, angles and variations of the ledge, but also the additional idea of *a reasonable quantity of surface ground for the convenient working of the ledge*, as a natural and necessary incident to the mine; and that by the reservation of "mines" from the operation of the Townsite Act, it intended to include the reservation of a reasonable quantity of surface ground. The rights of the Government in this reservation cannot be limited by the existence or absence of any valid mining claim or possession. Possibly they might be limited *to such an extent of surface* as might be fixed by the local mining rules, if such rules were shown to exist. But in their absence, it is clear that the Government has reserved a *reasonable quantity of surface for the convenient working of the mine*, incident to every mine reserved, the extent of *what is reasonable* being a question of fact.

It is equally clear that it is not bound in the regulation of its reserved rights to limit and control its grantees and licensees alone by the Act of 1866, but may pass any other act it pleases, and regulate subsequent grants of its reserved rights by subsequent enactments, so long as it does not transcend its own rights in the premises. If a location of a known mine were made under the Act of 1866, and afterwards forfeited to the Government by reason of failure to do annual work, one who should afterwards enter and locate the mine subsequent to the passage of the Act of 1872 could not properly claim that his rights are to be determined solely by the Act of 1866, and not

by the Act of 1872. The authority of one who enters upon a Government mine subsequent to the Act of 1872 must surely depend upon and be regulated by that act. The only possible question that can arise is: Does that act transcend in any of its provisions the rights of the Government itself, in case the entry is made upon a mine reserved from the operation of a townsite patent? In so far as its provisions do not transcend those rights, nothing can be more obvious than that that act must control as to the entry upon, occupancy and working of the mine, on the part of any one who first enters after its passage.

The Act of 1872 gives a license to every citizen of the United States to enter upon, explore and purchase all valuable mineral deposits in lands belonging to the United States, subject only to the restrictions of local rules, and limiting the location and working of every claim to fifteen hundred feet in length, and three hundred feet in width on each side of the vein. It is clear, that if the Government itself, by virtue of its reservation of its mines, could work any mine belonging to it, within the limits of a townsite patent, to a distance of three hundred feet from the vein, as being within the limits of a reasonable quantity of surface ground for the convenient working of the same, it can grant the right to whomsoever it will, *at any time*.

The right of the Government to a reasonable quantity of surface ground, reserved from the operations of a townsite patent dated in 1869, might exceed the limits of three hundred feet from the ledge; yet it has seen fit by the Act of 1872 to limit its subsequent grantees and licensees to that distance, so that they would have no right to exceed it, even if the Government might do so.

The rights of a locator of such a ledge under the Act of 1872 would certainly be regulated by that act, unless it appeared that the space of three hundred feet on each side of the ledge would exceed the limits of a reasonable quantity of surface ground provided for by the Act of 1866, in which case the right of the locator would be limited to that quantity.

The evidence here shows that the space of three hundred feet is within reasonable limits (Record, p. 13).

### 4. The Question of Abandonment.

#### (1.) *Evidence Contrary to Findings.*

The evidence is contrary to the finding of the Court that work on the ledge was abandoned prior to the issue of the townsite patent, and that there was no mine, mining claim or

mining possession on said Wagner ledge at the time of the issuance of the townsite patent.

The Act of 1866 expressly authorized and protected "exploration" and "occupation" of mineral land by citizens of the United States, and it is clear that Hughes & Lovey and Sigourney & Co. had a *possessio pedis* of the tunnels, inclines, shafts, stopes and dumps which were constructed and occupied by them. Their actual dominion over these conferred upon them a right of possession, which would prevail as against one not entering under a better title.

*Mintarn* vs. *Burr*, 16 Cal., 109.
*Corgell* v. *Cain*, 16 Cal., 573.
*Lawrence* vs. *Fulton*, 19 Cal., 690.
*Shelby* vs. *Houston*, 38 Cal., 411.
*Gray* vs. *Collins*, 42 Cal., 157.
*Goodrich* vs. *Landigham*, 46 Cal., 601.
*Funk* vs. *Sterrett*,, 59 Cal., 614.

It is true that a claim must be in some way defined as to limits, "before the possession of or working upon part gives possession to any more than that part so possessed or worked," but the possession of the *part worked* is *actual possession* which a trespasser would have no right to invade.

*Atwood* vs. *Fricott*, 17 Cal., 43.

In view of these decisions, and especially in view of the first section of the Mining Act of 1866, which threw the mineral lands open to "exploration and occupation," it is clear that the decision of the Court is against law, in holding that the parties who worked the Wagner ledge "were mere trespassers upon the public domain" (Record, p. 5).

There is no jot of evidence to show that these parties abandoned their right of possession, *or that the mine was worked out before the date of the patent. It affirmatively appears that the mine was not worked out* (Record, p. 13). The finding that there was no *mine* or mining possession at the time of the issuance of the townsite patent is clearly contrary to the evidence. There certainly was a *mine* at that date, and that it was not worked out is absolutely proved by the evidence; and there is nothing to sustain the finding of abandonment before July, 1869, but the mere cessation of actual work during the previous winter; and it is settled that that alone does not constitute or prove abandonment of a mining possession, but that *intention to abandon the claim* is of the essence of abandonment, and must be proved as matter of fact.

*Patridge* vs. *McKinney*, 10 Cal., 181, 183–4.
*Moon* vs. *Rollins*, 36 Cal., 333.

The evidence further shows that the *mine* was worked by various parties in 1869 and 1870 (Record, pp. 11, 14), and no mere cessation of work can prove *the destruction of a mine which is not worked out*, and is still found to be gold-bearing and profitable for mining purposes (Record, p. 13).

(2.) *Error in Law.*

It was error in the Court to refuse to allow the defendant to rebut the inference of abandonment by Hughes of his right in the Wagner ledge, by proving that his claim was sold for a price of $500 subsequent to the date of the townsite patent. This was competent evidence in rebuttal of that inference, and the Court ought not to have refused to allow proof that Hughes still asserted a claim after the townsite patent was granted, and then to find, without proof, that there was no mine or mining possession there at the date of the patent, because there was a prior abandonment. If the question of abandonment was at all material, this error of law would be prejudicial.

*Bell* vs. *Bed Rock T. & M. Co.*, 36 Cal., 218.
*Moon* vs. *Rollins*, 36 Cal., 340.

This evidence, also, tended to show that the mine was not considered as worked out or valueless at the date of this patent.

(3.) *Abandonment Immaterial, there being a Known Mine not Worked Out.*

But I insist that the question of abandonment, or of the existence of a mining claim or possession at the date of the townsite patent is *wholly immaterial*, it being sufficient that a *gold mine was known to exist prior to that date, and that it was not wholly worked out.* It *belonged to the Government* by virtue of the reservation of "*mines*," if it did not belong to any mining grantee or licensee of the Government.

The fallacy of the position of the State Court apparently consists in supposing that an *abandonment of a mining possession* by a prior licensee or grantee of the Government would inure to the benefit of the townsite claimant, notwithstanding the townsite patent expressly forbids the acquisition of the title to any *mine* under that act; and this upon the supposition that there is no *mine*, within the meaning of the Townsite Act, unless there is a valid mining claim or mining possession.

It is clear for the reasons already given, that a "mine" is not identical with a "mining claim or possession," and that a mere vacancy in possession caused by abandonment of a mining claim or mining possession, or by cessation to do required work thereon, merely causes the *mine* to revert to the Government, and to pass through it to its subsequent grantee, who may properly locate it. No title can be acquired to any mineral lands of the Government except in pursuance of its mining laws.

*Deffeback* vs. *Hawke*, 115 U. S., 392.
*Mullen* vs. *U. S.*, 118 U. S., 271.
*Steel* vs. *Smelting Co.*, 106 U. S., 447.
*Reynolds* vs. *Iron Silver Mining Co.*, 116 U. S. 687.

The proposition that a mere *vacancy in possession* of a *known mine of gold*, or of a *quartz ledge known to be gold-bearing* prior to the date of a townsite patent, can cause the *title to the ledge* to inure to a mere town lot claimant under the townsite patent, as against a subsequent locator of the ledge, under the mining laws of the Government, cannot be maintained, where such locator can demonstrate that the *mine* was not worked out, and proves by actual development thereof that it was necessarily as valuable in fact for its minerals at the date of the patent, as it was *before that date notoriously proved and known to be*.

The claimants under the townsite patent were chargeable with notice at the date of the patent of what mineral of value actually existed in the Hughes & Lovey Tunnel, or in the then open works, where the Dowers found and extracted gold worth $20 per ton.

If the *mine* was reserved *when the patent was issued* in 1869, no mere lapse of time between the time when work was done on the mine by Smith and Bigelow and the time of the Dower location could affect the rights of the Government to the reserved *mine*, or the rights of subsequent locators thereof claiming under the Government, nor could the subsequent acts of town lot owners in filling up any shafts prejudice the right of the Government to the *mine*, or of any persons claiming under the Government.

### 5. Miscellaneous Questions.

#### (1.) *Failure to Find upon Issues.*

If the limits of prior "*mining possession*" could be at all material, the Court erred in failing to find upon the issue as to whether the work of the defendants was not within the limits

of the *possessio pedis* held by claimants prior to 1869. (Record, p. 4.)

The Court also erred in failing to find upon the issue as to whether the Wagner ledge was a part of the public mineral lands of the United States. (Record, p. 3.)

Failure of the Court to find upon a material issue is ground for a new trial under the laws of California.

*Dowd* vs. *Clark*, 51 Cal., 262.

(2.) *Findings Inconsistent with Each Other and with the Judgment.*

The findings are inconsistent with each other, and with the judgment. The findings in regard to the Wagner ledge and the location thereof by Harriet Dower (Record, p. 5), are inconsistent with the finding of ownership in Philip Richards (Record, pp. 5, 6), and are inconsistent with the judgment in favor of the plaintiff.

Where the findings are inconsistent, it is ground for a new trial.

*Sloss* vs. *Allen*, 64 Cal., 47.
*Kerns* vs. *McKearn*, 65 Cal., 411.

## Conclusion.

It is respectfully submitted that the decision and judgment of the Superior Court of Nevada County and of the Supreme Court of California is against law in each of the particulars specified in the specifications of error herewith submitted, and that the judgment of the said Supreme Court of said State and the judgment and order of the Superior Court of Nevada County, California, should be reversed.

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IN THE

# Supreme Court of the United States.

*No. 178.*

JOHN DOWER ET AL., PLAINTIFFS IN ERROR,

*vs.*

WILLIAM G. RICHARDS ET AL., DEFENDANTS IN ERROR.

## Supplemental Brief for Plaintiffs in Error.

*Fallacies in Opinion of State Court.*

We desire to point out the following fallacies in the opinion of the State supreme court appearing in the record:

1st. *The opinion is essentially inconsistent.* It sustains the ruling of the lower court in excluding evidence of the sale of the interest of the deceased, Hughes, in his tunnel possession running through the lots in controversy, for the sum of $500, in the year 1871, upon the alleged ground that such sale was "not competent evidence of the known or estimated value of the vein at the date of the patent" (Record, p. 23). Yet the same opinion most inconsistently argues from the asserted fact "that from 1869 to 1884, a period of more than fifteen years, it lay idle and untouched in the

midst of one of the busiest and most enterprising mining regions of the State," taken in connection with other asserted facts, which are mistakenly stated, that "the conclusion is irresistible that from the time work ceased in the winter of 1868–69, it was regarded as a worked out and valueless lode, at least so much of it as was embraced within the lines of that lot" (Record, p. 18). But clearly if the *valuelessness* of the lode in 1869 and the fact that it was worked out at the date of the patent can be inferred from *one state of facts occurring after that date*, why may not its *value* for mining purposes at that date be inferred from *another state of facts occurring after that date*, such as the market value of the Hughes tunnel interest, which sold for $500 in 1871, and the further fact that the Dowers actually extracted 400 or 500 tons of valuable rock from the identical lots in controversy, taken from the vicinity of the old works, where the rock was found to be of the value of $20 per ton. (Record, p. 13.)

The opinion is further essentially inconsistent in holding that "the evidence was sufficient to prove an actual intention of these old miners to *abandon* the mine at the time when they ceased to work it, in the winter of 1867–'8," while at the same time the court disallows evidence the positive and conclusive effect of which, if allowed, would be to rebut absolutely any intention on the part of Hughes or his executors to abandon his tunnel possession or any rights that the Sigourney Company had acquired as his lessees.

An intention to abandon a mining possession may be

rebutted by proof of *subsequent acts* on the part of the possessor or his representatives *inconsistent* with such intention.

Willson *vs.* Cleaveland, 30 Cal., 192, 201–'2.
Bell *vs.* Bed Rock Tunnel Co., 36 Cal., 215, 218.
Moore *vs.* Rollins, 36 Cal., 340.

It is clear that, if the mine was in fact reserved from the operation of the town-site patent *at the time when that patent took effect*, no subsequent abandonment of any particular claimant's rights would have the least effect to vest the title to the mine in any grantee claiming under the town-site patent.

2d. *The opinion mistakenly misstates and omits to state material facts.* It asserts that "the evidence in this case shows that the Wagner vein is scarcely more than *a foot* in thickness" (Record, p. 18). The evidence, in fact, shows that "in the lower tunnel the ledge is *two and a half feet in places*. Its average is about twenty inches" (Record, p. 11). The opinion also asserts "that some hundreds of tons of rock have been extracted from it within the boundaries of these lots prior to 1869" (Record, p. 18). The evidence shows that Wagner Bros. took from the Davenport lot, about 200 feet from the Richards lot, about 450 tons of rock, more or less (Record, p. 11), but the record nowhere states what amount of rock was taken out of the Richards lots by Hughes & Lovey or the Sigourney Company. The intimation of the evidence is that Sigourney began work in 1865 under a lease from Hughes & Lovey (Record, pp. 12, 13). *Non constat*, but that the lease may have expired in the winter of 1868–'9, when the Sigourney Company quit work, or

the rental may have come to an end by the death of Hughes, the date of which does not appear.

The opinion also states that the ledge "*had been worked down to the water line* by means of shafts, drifts, tunnels, &c." (Record, p. 18). This is a remarkable misconception of the evidence. Upon this statement the court largely predicates its conclusion that the ledge must be considered as worked out and valueless. *This statement is not supported by the evidence.* The water line is Deer creek, into which Woodpecker ravine empties (Record, p. 10), and there is not the slightest evidence that the Hughes and Lovey tunnel was run into the ledge from that level. As a matter of fact, that tunnel was run in from Woodpecker ravine about 300 feet from the line of the ledge (Record, pp. 10, 13), and though the assertion is *de hors* the record, we are sure; from a personal knowledge of the ground, that if a tunnel were run in on this ledge from the level of the water line of Deer creek *thousands of tons* of ore could still be extracted from the ledge beneath the surface of the Richards lots before being "*worked down to the water line.*" The fact does, however, appear from the record, though the opinion of the State supreme court is profoundly silent thereupon, notwithstanding its direct bearing upon the actual state of the lode upon the Richards lot at the date of the town-site patent in 1869, that the Dowers have actually taken out 400 or 500 tons of valuable ore from an old shaft sunk on those lots prior to 1869, which they found averaged $20 per ton, in the vicinity of the old works (Record p. 13). Taking this fact in connection with the conceded fact that the ledge was known to be gold-bearing and to have been profitably worked prior to 1869, it amounts to a positive demonstration

that the ledge was actually valuable at the date of the patent, and might then have been profitably worked upon the Richards lots if any one had seen fit to work it at that precise date. It is certain that if the ledge could not still be profitably worked beneath the surface of these lots this case would never have found a position upon the calendar of this Court.

3d. *The opinion erroneously intimates that defendants were bound to allege, as well as to prove, that the ledge was valuable at the date of the patent.* The allegation that "the said Wagner ledge and the portion thereof which crosses the said lands was known to be a gold-bearing ledge, and was held, possessed, *worked, and mined as such long prior and subsequent to said patent*" (Record, p. 5), necessarily involves an assertion that it was *worth mining at the date of the patent*; but no specific allegation on that subject need have been made. In an action of ejectment it is the well-settled law of California that the denial of the plaintiff's title enables defendant to prove any facts in disproof of plaintiff's title and in support of his own title without the necessity of any specific allegations as to the nature of defendant's title or as to the facts constituting it, which are really matters of evidence, in disproof of plaintiff's title.

Clark *vs.* Thurston, 47 Cal., 21, 29.
Daniels *vs.* Henderson, 49 Cal., 247.
Thompson *vs.* Thompson, 52 Cal., 157.
Roberts *vs.* Columbet, 63 Cal., 22.

4th. *The opinion misconceives the law as to the effect of the subsequent working of the same mine.* It seems that the effect

We respectfully submit that the State supreme court, as well as the superior court of Nevada county, has erred in its judgment, and that the judgment should be reversed, with instructions to the supreme court of California to reverse its judgment and remand the cause to the superior court of Nevada county for a new trial.

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IN THE

# Supreme Court of the United States.

178

JOHN DOWER ET ALS., PLAINTIFFS IN ERROR,

*vs.*

WILLIAM G. RICHARDS ET ALS., DEFENDANTS IN ERROR.

## BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

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IN THE

# Supreme Court of the United States.

JOHN DOWER ET ALS., PLAINTIFFS IN ERROR,

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WILLIAM G. RICHARDS ET ALS., DEFENDANTS IN ERROR.

## BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

### STATEMENT OF THE CASE.

The premises in controversy in this action constitute a portion of and are embraced within the town site of Nevada City, and being lots 6 and 7, in block 43 of said city.

It was stipulated at the trial between counsel for respective parties that the defendants in error, as executors of the estate of Phillip Richards, deceased, have acquired whatever rights in the premises described in the complaint were acquired by the town-site patent of said Nevada City.

*Vide* Transcript of Record, page 8.

A quartz ledge, known as the Wagner ledge, crosses said premises and was known and worked by various parties prior to 1868, but was never located, and the boundaries of the claim were never marked, nor was any surface ground ever marked off or designated.

*Vide* Transcript of Record, pages 5 and 13.

Work was abandoned on said ledge in the winter of 1868 and 1869 and prior to the issuance of said patent.

*Vide* Transcript of Record, pages 5 and 13.

July 1, 1869, the Government of the United States issued a patent to the town site of Nevada City, which included in its description the premises in controversy.

*Vide* Transcript of Record, page 8.

The mining excavations on said lots were filled up and a dwelling-house of the value of four thousand dollars, two barns, and outhouses constructed thereon, and a fruit orchard, wheat, clover, and hay grown thereon.

*Vide* Transcript of Record, page 8.

In the year 1884 the plaintiff in error, Harriet Dower, made a quartz mining location thereon.

*Vide* Transcript of Record, page 8, folio 17.

And sunk shafts and hoisted dirt and pumped water, which, mixed with dirt and quartz sand and refuse matter from defendants' quartz mine, flows for two hundred or three hundred feet over the surface of the lots and ruins them for agricultural purposes, the lots alone being worth two thousand dollars.

*Vide* Transcript of Record, pages 9 and 10.

Actions in ejectment, and also for injunction, by defendants in error against plaintiffs in error.

The act of July 1, 1864, 13 U. S. Stats. at Large, p. 343, repeals prior town-site acts and provides new procedure, but says nothing with regard to mines or mineral lands.

The act of March 3, 1865, 13 U. S. Stats. at Large, p. 530, contained the following:

"*Provided further*, That where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized the title to town lots to

be acquired shall be subject to such recognized possession and the necessary use thereof."

The town-site act of March 2, 1867, 14 U. S. Stats. at Large, p. 541, contained the following provision:

"*Provided*, That no title shall be acquired under the provisions of this act (being a town-site law) to any mine of gold, silver, cinnabar, or copper."

But this was amended by the act of June 8, 1868, 15 U. S. Stats. at Large, p. 67, so as to read as follows:

*Provided, That no title under said act of March 2, 1867, shall be acquired to any valid mining claim or possession held under the existing laws of Congress.*

The town-site patent in this case was issued in 1869, and we take it that no subsequent legislation by Congress could affect the rights acquired by said patent.

In 1869, then, the statutory law stood as follows:

That a miner who complied with the local laws could claim and hold a vein of gold-bearing rock with as much surface ground "*as fixed by local rules*" and to the extent to which such vein was possessed and such possession recognized by local authority; also that the town-site patent would give no title to any valid mining claim of possession held under the existing laws of Congress *at the* time of the issuance of such patent.

In the case at bar the court found as follows:

"That there is no proof in this cause that there were any local mining rules in force in Nevada City mining district in the year 1869 or at any time prior to the granting of town-site patent aforesaid in 1869."

*Vide* Transcript of Record, page 6.

This finding is not questioned by plaintiffs in error in their specifications of error.

This being so, the town-site patent to Nevada City of July

1, 1869, conveyed the entire premises in controversy in this action, for there existed in the Nevada City mining district at that date neither local mining rules or customs, nor upon the premises in controversy *any valid mining claim or possession*; in fact, no claim at all. The location of plaintiffs in error was made in 1884, a period of fifteen years after the issuance of the town-site patent, and their rights in the premises depend solely upon such location. Work was abandoned on the ledge within the premises in controversy long prior to the issuance of said patent, to wit, in the winter of 1868 and 1869.

*Vide* Transcript of Record, pages 8 and 13.

Plaintiffs in error claim that work was done on the *ledge* at a late date, but this work was outside of the premises in controversy and at a point two, three, or four hundred yards south of the premises in controversy.

*Vide* Transcript of Record, page 11.

And claim that because the ledge was gold-bearing and known to exist prior to the date of the town-site patent that fifteen years after its issuance they are entitled to *locate and hold it, with* three hundred feet of surface ground on each side thereof, by virtue of the mining act of 1866.

This question was passed upon in the prior case of Dower *vs.* Richards (73 Cal., page 477), adversely to the present appellants, and correctly, for the reasons—

1st. That prior to the issuance of said patent there were no local rules or customs in Nevada mining district.

2d. That no location of any kind was ever made upon the premises prior to said date.

3d. Because prior to said date there was no law of the United States which prescribed the method by which a gold mine could be prospected and worked.

4th. Because the law giving a width of not exceeding three hundred feet to a quartz mining claim on each side of the lode was not passed by Congress until 1872, nearly three years after the patent issued. The cases cited by appellant upon the question of abandonment are not in point. In Deffeback *vs.* Hawke, 115 U. S., 392, the town-site entry was made after the mining locator had paid for the land embraced in his claim and became entitled to a mineral patent therefor under a valid mining claim and possession, and they all relate to cases of valid mining claims and possessions actually held, owned, and worked at the date of issuance of the patent and known at the time to be valuable for mining, and not to a case like the one at bar, when work has been done upon a ledge without location of any kind, and abandoned prior to the issuance of the town-site patent, and the shafts have been filled up, and the land cultivated and used for homes for fifteen years prior to an attempted location after the town-site patent was issued. The policy of the Government was, as respondents view it, to reserve from the operation of the town-site patent any such mining claims or possessions as were actually known to be valuable for miners, and were actually held and worked as such under a valid location at the date of its issuance. That the premises in controversy were not known to be valuable for minerals is best evidenced by the fact of their abandonment for all mineral purposes and by the fact that no adverse claim was filed against the issuance of the town-site patent. The appellants in this case, so far as the record shows, are even perfect strangers to the former parties who mined upon the premises in controversy and to any rights which they may have claimed, and have no privity with them; yet they claim the right by virtue of such mere prior working without location of any kind to destroy homes of thousand of dollars in value, and ask for a decision which will render insecure the title to all properties within the limits of every town

site in the State, situate in a locality where gold was ever found. Appellant's position is not supported by the law.

Most of the early mining towns of the State were located on or near valuable gold deposits. In many cases the deposits were finally worked out or abandoned. Over the cuts, drifts, and ravines left by the miners valuable business blocks have been erected. Shafts and cuts have been filled and unsightly piles of débris have yielded place to gardens and homes.

Under the town-site acts the inhabitants have sought to perfect the title to their property and to put an end to the vexatious litigation over mere possessory titles.

Nor has this effort been made regardless of vested mining rights. From the beginning of mining in the State, mines have been claimed and worked in quiet and undisputed possession within the city limits of many mining towns. The spirit of fairness and equal justice to all, contained in the local laws of the early miners, has been wisely preserved and extended by the statutes. The vested rights of mineral claimants and the homes of miners have both been protected.

But if the contention of appellant is correct, then this reliance upon title under town-site patent is but a fancied security.

If the mere fact that at some time in the past lands have been mined and mineral in paying quantities extracted therefrom is to leave forever those lands subject to location and work by claimants, strangers to the original titles; if the question of title to property in mining towns is to be left to the judgment of every itinerant prospector, as to whether every particle of mineral has been gleaned from the old workings, then is a town-site patent of little avail.

Such an interpretation of the law is not only unnecessary, but would place in jeopardy much of the property in mining towns, and the more extensive the improvements the greater the incentive to mineral claimants to remember that the lands had once contained gold in paying quantities.

The true intent of the town-site acts was but to exempt *existing* mining claims and mining possessions; not to render all claims upon which work had ceased prior to the town-site grant forever subject to location.

The bold question presented in this case is whether fifteen years after granting of a town-site patent parties can enter upon a quartz lode within the patented limits and make a valid location thereon where there is no proof of any location of said lode prior to the patent.

The locators show no conveyance from any prior claimant and make no attempt to show any title in themselves except as acquired by their location.

As already shown, the statute as it stood in 1869, when the town-site patent to Nevada City was issued, exempted only *mining claims* and mining possessions.

"A 'mining claim' as the term is used in the statutes of the United States is that portion of a vein or lode and of the adjoining surface, or of the surface and subjacent material, to which a claimant has acquired the right of possession by virtue of a compliance with the laws of the United States and the local rules and customs of miners."

See Williams *vs.* S. C. Mining Asso. of Baltimore, 66 Cal., p. 198.

In the present case the evidence shows that prospectors ceased work on the lode in the winter of 1868–'9; that they had no location thereon, and that there were no local mining laws or rules, usages, or customs in force in the district.

It is obvious that, having neither possession nor location, there was nothing to be excepted from the operation of the town-site patent; therefore there was no land subject to location when the defendants attempted to locate fifteen years after the issue of such patent.

Plaintiffs in error place great stress upon the fact that there is no proof in this case that the ledge had ceased to pay in 1869. The fact that work ceased in the winter of 1868–'9

and that the ledge in controversy remained idle for fifteen years thereafter speaks for itself.

Certainly the testimony in the case shows that as to the Government of the United States the claimants were mere trespassers, having in no way connected themselves with the Government. It is, however, immaterial for the purposes of this case what the character of their possession was, inasmuch as it had ceased before the granting of the town-site patent.

Defendants in error are not the claimants of a mine or mining claim but of certain town lots, and are the owners of everything therein contained unless reserved from the patent.

In the case of Davis' Administrator *vs.* Weibbold (139 U. S., 507), decided by the Supreme Court of the United States April 6, 1891, Mr. Justice Field, delivering the opinion of the Court, said:

"The provisions of the public town-site laws, prohibiting acquisition of title thereunder to mines of the precious metals and protecting therefrom possessory claims under the mining laws, must be construed in accord with the uniform exception in Federal legislation of mineral lands from grant or sale, and held merely to prohibit passage of title thereunder to mines of gold, silver, cinnabar, or copper, which are known to exist on the issue of the town-site patent, and to mining claims and possessions then lawfully existing. Such exceptions include only those lands which at the date of the grant are of known sufficient mineral value and extent to justify expenditures for the extraction of the mineral.

"Town-site patent of earlier date covering same premises embraced in junior mining patent carries the title in absence of proof establishing the known existence of the mine at the date of such town-site patent."

And quotes with approval from the opinion of the Court in the case of The United States *vs.* Iron Silver Mining Co., 128 U. S., 673, the following:

"It is not enough that there may have been some indications by outcroppings on the surface of the existence of lodes or veins of rock in place bearing gold or silver or other metal to justify their designation as known veins or lodes.

"To meet that designation the lodes or veins must be clearly ascertained and be of such extent as to render the land more valuable on that account and justify their exploitation."

And further says:

"In connection with these views it is to be borne in mind also that the object of the town-site act was to afford relief to the inhabitants of cities and towns upon the public lands by giving title to the lands occupied by them and thus induce them to erect suitable buildings for residence and business. Under such protection many towns have grown up on lands which, previously to the patent, were part of the public domain of the United States, with buildings of great value for residence, trade, and manufactures. It would in many instances be a great impediment to the progress of such towns if the titles to the lots occupied by their inhabitants were subject to be overthrown by a subsequent discovery of mineral deposits under their surface. If their title would not protect them against a discovery of mines in them, neither would it protect them against the invasion of their property for the purpose of exploring for mines. The temptation to such exploration would be according to the suspected extent of the minerals; and, being thus subject to indiscriminate invasion, the land would be to one having the title poor and valueless just in proportion to the supposed richness and abundance of its products. We do not think that any such results were contemplated by the act of Congress, or that any construction should be given to the provision in question which could lead to such results. Our conclusion, as already substantially stated, is that Congress only intended to preserve existing rights to known mines of gold, silver, cinnabar, or copper, and to known mining claims and possessions, against any assertion of title to them by virtue of the conveyances received under the town-site act, and not to leave the titles of purchasers on the town sites to be disturbed by future discoveries."